

Briefing to the Public Inquiry into the Earthquake Commission

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Interface between EQC and private insurers

Purpose

- 1 The purpose of this paper is to describe the interface between the Earthquake Commission ('EQC') and private insurers. The paper covers:
 - a a brief overview of the insurance provided by the Earthquake Commission Act 1993 ('Earthquake Commission Act'); the insurance typically provided under policies issued by private insurers; and the interaction contemplated by the Earthquake Commission Act;
 - b apportionment in the context of the Canterbury earthquake sequence;
 - c impacts of the interface between EQC and private insurers in Canterbury and various initiatives EQC implemented to manage the EQC and private insurer interface;
 - d the lessons learned on the interface between EQC and private insurers.

Executive Summary

- 2 The nature and extent of cover provided under the Earthquake Commission Act and how that cover interrelates with any cover that private insurers might provide above the Earthquake Commission Act means that it is necessary for EQC to have constructive working relationships with private insurers.
- 3 The multiple damage-causing earthquakes which formed part of the Canterbury earthquake sequence meant EQC had to apportion damage across earthquake events to determine when the damage occurred and identify residential building claims which exceeded (or potentially exceeded) the monetary limit¹ under the Earthquake Commission Act (known as 'cap').
- 4 If apportionment showed that no damage from any single event exceeded EQC's cap, the repair to the residential building was generally managed under EQC's Canterbury Home Repair Programme. However, if damage from a single event was over EQC's cap then the private insurer was liable for the amount of damage over and above the EQC cap.²

¹ For a more detailed explanation, see Appendix 1.

² Subject to the terms and conditions of the contract of fire insurance.

- 5 As EQC’s response to the Canterbury (and Kaikōura) events progressed, EQC has strengthened its relationship with private insurers. Initiatives implemented by EQC over the past nine years, and particularly over the past two years, have helped to form the foundations of EQC’s on-going relationship with private insurers. Such as:
- a the Protocol 1 agreement which set out a procedure which involved EQC continuing the repair of a customer’s property (even though the cost was going to exceed EQC’s cover under the Earthquake Commission Act) and the private insurer reimbursing EQC for the over cap amount at a later date;
 - b the Shared Property Project to facilitate the settlement of multi-unit buildings which were insured by multiple insurers, including EQC claims that remained under cap.
 - c the Kaikōura Memorandum of Understanding which involved more of a partnering approach³; and
 - d various initiatives put in place in response to recommendations from the Christine Stevenson, Independent Ministerial Advisor ‘Report of the Independent Ministerial Advisor to the Minister Responsible for the Earthquake Commission Act’ April 2018 (‘the Stevenson Report’).
- 6 There will continue to be differences between EQC and private insurers because EQC is operating as a Crown entity and within the confines of the Earthquake Commission Act. The private insurers, by contrast, operate within the constraints of contracts of insurance and responsibilities to their shareholders. Initiatives to manage the relationship between EQC and private insurers will need to recognise this contrast, while ensuring that the focus on EQC’s customers remains at the heart of EQC’s operations.

Insurance provided by EQC and the insurance typically provided by private insurers

- 7 Under the Earthquake Commission Act, EQC administers a statutory scheme of natural disaster insurance for residential buildings for replacement value. The amount of EQC’s liability in respect of each insured residential building is subject to a monetary limit (known as ‘cap’).⁴ Private insurers can offer natural disaster damage insurance beyond the cap provided in the Earthquake Commission Act.⁵

³ See Briefing to the Public Inquiry into the Earthquake Commission, *The Kaikōura Earthquake*, dated 4 July 2019

⁴ See section 18, Earthquake Commission Act.

⁵ See section 30, Earthquake Commission Act. A private insurer’s cover under the contract of fire insurance can be either “ground up” cover or “top up” cover. Section 30 contemplates both. In practice, most private insurer contracts of fire insurance provide for “top up” cover. With “top up” cover, EQC pays for all natural disaster damage covered by the Earthquake Commission Act up to the cap specified in the Act, and then the private insurer pays for the balance (if any). With “ground up” cover, the private insurer pays for all natural disaster damage within the terms of the contract of fire insurance and EQC covers the balance, if any (within the scope of the EQC insurance up to the limit specified in the Earthquake Commission Act).

- 8 When the Earthquake Commission Act was enacted in 1993, it was expected that most homes could be rebuilt within the cap of EQC’s liability for each insured home. In introducing the Earthquake Commission Bill in December 1992, the Hon Maurice McTigue (the Associate Minister of Finance) observed:⁶

Under the new proposal the commission will pay home owners a total replacement value of up to \$100,000, plus goods and services tax—a total of \$112,500. It means that for most homes the cover that is offered by the commission will in the majority of instances be fully sufficient to rebuild homes that are destroyed by earthquakes or other natural disasters. The value of improvements is generally about two-thirds of the total value of residential property.

I would also make it clear that in most disasters the underlying land will be unaffected. Thus the \$112,500 figure should serve to protect the value of most home improvements. For many people the changes will do away with any need for top-up insurance cover. For many more people the changes will reduce the level of private insurance that is required for total replacement.

- 9 Over time, the need for (and level of) private insurance cover that is required for total replacement of the average home has increased with inflation. The Earthquake Commission Act gave the Government of the day the ability to increase the amount of EQC’s insurance available for residential buildings, because the \$100,000 limit in section 18(1)(c) could be fixed at a higher amount by regulation. Until the Earthquake Commission Amendment Act 2019 (see paragraph 13 below), no such changes had ever been made.
- 10 EQC also provides insurance for certain residential land and currently also for personal property (or contents).
- 11 **Appendix 1** outlines the current general scheme of the Earthquake Commission Act and notes the ways in which private insurer cover may interact with that scheme.
- 12 The interaction between insurance cover under the Earthquake Commission Act (also known as EQCover) and private insurance cover may be summarised as follows:
- a The Earthquake Commission Act covers natural disaster damage that occurs to a residential building for its replacement value up to the cap per event (typically, \$100,000);
 - b The Earthquake Commission Act also covers natural disaster damage that occurs to certain land⁷ but only on an indemnity value basis, up to the cap per event set out in section 19 of the Earthquake Commission Act;

See *Firm PI 1 Ltd v Zurich Australian Insurance and Body Corporate 398983* [2014] NZSC 147

⁶ (15 December 1992) 532 NZPD 13187.

⁷ See clause 3, Appendix 1 which sets out the definition of “residential land”. See also, the Briefing to the Public Inquiry into the Earthquake Commission, *Canterbury Land Programme*, dated 24 May 2019

- c The Earthquake Commission Act does not cover certain “out of scope” items, such as paving or other artificial surfaces;⁸
- d Subject to the terms and conditions of the contract of fire insurance, the private insurer may cover natural disaster damage that is not covered under the Earthquake Commission Act. Typically, the private insurance would include:
 - i cover for any natural disaster damage to the residential building beyond the EQC cap (typically, \$100,000); and
 - ii cover for any natural disaster damage to “out of scope” items, such as paving; and
 - iii cover for natural disaster damage to bridges, culverts and retaining walls beyond the amount of cap under section 19, Earthquake Commission Act.
- e Depending on the terms of the contract of fire insurance, the private insurer may provide cover for natural disaster damage not covered under the Earthquake Commission Act:
 - i either on a replacement value basis or only on a present day value (or indemnity value) basis (although the replacement value basis is more common); and
 - ii either on an open-ended basis (where there is no cap recorded on the private insurer’s liability) or on a “sum insured” basis (where the private insurer’s liability is limited to a monetary amount specified in the policy). Note, sum insured policies are now more common in the private insurance market following the Canterbury earthquake sequence, at least for natural disaster cover.
- f The Earthquake Commission Act provides cover for any natural disaster damage to personal property (contents) on the same basis (whether replacement value cover or indemnity value cover) as the private insurance to a maximum amount of \$20,000 or any lesser amount to which the personal property is insured against fire.⁹

Earthquake Commission Amendment Act 2019

- 13 On 1 July 2019 the Earthquake Commission Amendment Act 2019 saw the typical cap for EQC insurance for a residential building increase from \$100,000 to \$150,000.¹⁰ This is the first change in the cap since 1994.

⁸ See Schedule 2, Earthquake Commission Act. See also section 21, Earthquake Commission Act.

⁹ See Earthquake Commission Amendment Act 2019 which repeals section 20 of the Earthquake Commission Act.

¹⁰ This change will be phased in over a 12-month period.

- 14 The Earthquake Commission Amendment Act will phase out personal property (contents) cover.¹¹ For this reason, this briefing provides limited content addressing the interface between EQC insurance and private insurer insurance as it relates to contents.
- 15 The Earthquake Commission Amendment Act also allows the information EQC collects for assessing and settling a claim by an insured person to be disclosed to the private insurer – without infringing information privacy principle 11 in section 6 of the Privacy Act 1993.¹²

Interaction between EQC and the private insurer contemplated under the Earthquake Commission Act

- 16 In practice, the interaction between EQC insurance and private insurance cover means that EQC and the private insurer share a relationship with the insured person. However, the Earthquake Commission Act contains few references to private insurers (referred to in the Earthquake Commission Act as “insurance companies”). Nor does the Earthquake Commission Act contemplate much interaction between EQC and the private insurer in administering their respective insurances over any given residential property.
- 17 Section 18 provides for insurance under the Earthquake Commission Act where a person has entered into a contract of fire insurance with an insurance company. However, there is no requirement for private insurers to advise EQC when it enters into a contract with a customer. This means that until an event occurs, there is no way for EQC to understand its potential exposure (see paragraphs 53 - 59 below), for example:
- a which properties are insured;
 - b whether the building in fact, is a residential building for the purposes of the Earthquake Commission Act;
 - c the construction type and condition of the residential building and the nature of the associated land or personal property; and
 - d in the case of a multi-dwelling building, what disclosure¹³ (if any) has been made to the private insurer about the number of dwellings in the residential building at the time that the contract was entered into.

¹¹ This change will be phased in over a 12 month-period.

¹² See section 31A of the Earthquake Commission Act as inserted by Part 1 of the Earthquake Commission Amendment Act 2019.

¹³ See section 18(3), section 18(1)(c) of the Earthquake Commission Act.

- 18 The Earthquake Commission Act provides that the amount of the premium payable by the private insurer to EQC is a debt due by the insured person¹⁴ to the private insurer from the insured person.¹⁵ For any given month, the private insurer's premium payment to EQC for that month is an aggregated payment of all the premiums that the private insurer has become liable to pay EQC during that month, less a discount of 2.5% of the total amount of premiums collected on behalf of EQC. EQC has no visibility of which properties the aggregated premium payment relates to.¹⁶
- 19 Until recently, the Earthquake Commission Act contained few provisions that touched on information sharing between EQC and the private insurer. The information EQC collects for assessing and settling a claim by an insured person can now be disclosed to the private insurer and the private insurer can then use that information in assessing and settling the insured person's claim with the private insurer.¹⁷ There is no reciprocal obligation on private insurers to provide claim information they hold to EQC.
- 20 Accordingly, much of the way in which interaction occurs in practice is determined by EQC's Board and management, the private insurer counterparts and the particular issues requiring interaction. EQC also has to have due regard to the expectations of the Minister responsible for EQC.¹⁸
- 21 Initiatives to facilitate an interface between EQC and private insurers prior to the Canterbury earthquake sequence, throughout EQC's response to the Canterbury earthquake sequence, and in response to the Kaikōura earthquake, are addressed in the following sections.

¹⁴ Under section 2(1) of the Earthquake Commission Act, an "insured person" is a person for the time being entitled to the benefit of the contract of insurance.

¹⁵ See section 23(2) Earthquake Commission Act. Note that, if the private insurer does not "carry on business in New Zealand", the debt is deemed payable by the insured directly to EQC.

¹⁶ For further detail, see Briefing to the Public Inquiry into the Earthquake Commission, *Managing risk – Premiums, Reinsurance and the Natural Disaster Fund*, dated 4 July 2019 at paras 63 - 81.

¹⁷ See in particular section 31A(1)(c) which provides that EQC may collect information for (among other purposes) administering the Earthquake Commission Act and facilitating natural disaster preparedness, response, or recovery (including settlement of insurance claims by insurance companies) and that information and section 31A(2)(a) of the Earthquake Commission Act which provides that information collected by EQC for any of the permitted purposes is taken to have been collected for all of those purposes.

¹⁸ For example, the letter from Hon Dr Megan Woods to Dame Annette King, Chair of the Board of EQC dated 6 March 2018.

EQC's statutory functions

- 22 In the context of the Canterbury earthquake sequence, much of the interaction between EQC and private insurers, especially in relation to residential buildings, was centred on EQC's cap per event. A customer had cover but often got caught in the middle between the private insurer and EQC working out whether the claim was over or under cap. EQC was confined to working within the Earthquake Commission Act. As a statutory entity, EQC may act only for the purpose of performing its statutory functions¹⁹ under section 5 of the Earthquake Commission Act²⁰ including any functions conferred on EQC by way of a Ministerial Direction.²¹
- 23 When developing initiatives to address the interface between EQCover and private insurance cover, EQC has been conscious of its statutory functions and the constraints of the associated legislative provisions. This is particularly so when developing initiatives which involve settlement by payment or repair above the cap per event (generally where EQC expects or has pre-agreed reimbursement). At the same time, EQC has faced the competing tensions which arise from customers wanting efficient settlement of their claim and private insurers wanting to identify, as quickly as possible, claims which are above the cap for an event.
- 24 In most circumstances where EQC has settled above its cap per event, it has endeavoured to reach an agreement with the private insurers regarding reimbursement at a later point in time and/or is seeking reimbursement through "insurer finalisation" (see paragraphs 160-162 below).²² This has allowed customers to move on, leaving EQC and the private insurers to resolve any outstanding issues between themselves. In other cases, EQC pays over cap where it has no expectation of reimbursement from private insurers such as the disregarded cost process (see paragraphs 140 - 148 below). For example, if there was workmanship (or a repair strategy carried out) on the first time repair which doesn't meet the required standard, EQC does not count the cost of any below standard work (that does not repair damage) in calculating whether the EQC cap has been reached. However, EQC may actually end up paying (in total) more than the cap by the time the repair is redone.

¹⁹ See section 18, Crown Entities Act 2004.

²⁰ Section 14(1)(c) of the Crown Entities Act 2004 provides that the functions of a statutory entity also include any functions that are incidental and related to or consequential on its statutory functions.

²¹ See section 5(1)(f)(ii) of the Earthquake Commission Act. Further detail on the legal basis of a Ministerial Direction and the Ministerial Directions made for the period 1 January 1994 to date can be found in the Briefing to the Public Inquiry into the Earthquake Commission '*Ministerial Directions since 1 January 1994*' dated 13 March 2019.

²² Which provide further detail on the financial reconciliation process between EQC and private insurers.

Apportionment - Canterbury earthquake sequence

- 25 Cover under the Earthquake Commission Act begins afresh after each occurrence of natural disaster damage. For this reason, it is necessary to determine what damage occurred from each earthquake in circumstances where a residential building is damaged by two or more events. By doing so, it can be worked out what costs EQC needs to cover and what costs potentially rest with the private insurer for each event. This process is called apportionment.
- 26 It was not entirely clear from the wording of the Earthquake Commission Act²³ how EQC should respond where a residential building was damaged by multiple earthquake events. Sections 18 and 20 are silent on whether the amount of insurance under the Earthquake Commission Act is an aggregate amount available during the period of insurance or whether that amount was available for each occurrence of natural disaster damage during the period of insurance.
- 27 From at least early March 2011, EQC and the Insurance Council of New Zealand engaged with each other on the correct interpretation of the Earthquake Commission Act. Agreement could not be reached. EQC, the Insurance Council of New Zealand, Vero Insurance New Zealand Limited and IAG New Zealand Limited co-operated to jointly bring a declaratory judgment proceeding.²⁴ Separately, and around the same time, Tower Insurance Limited filed its own proceeding against EQC in the High Court seeking a declaratory judgment addressing similar questions.²⁵
- 28 On 2 September 2011, the High Court delivered its judgment, *Re Earthquake Commission*, confirming that the insurance under section 18 (and section 20) of the Earthquake Commission Act is a continuing cover and the amount of insurance is therefore available for each occurrence of natural disaster damage during the period of insurance.²⁶ The effect of the decision was to confirm that where a residential building was damaged as the direct result of multiple earthquakes EQC had to apportion that damage.

²³ Section 18 and 20 of the Earthquake Commission Act when read in conjunction with clause 6 of schedule 3.

²⁴ A declaratory judgment is a type of legal proceeding in which a party asks the High Court for a formal statement on a legal question. That formal statement on the legal question then becomes binding on the party who has asked the question.

²⁵ Very soon after the two declaratory judgment proceedings were filed, the then Executive Judge at the Wellington registry of the High Court, Justice Miller, made fast-track directions to progress the two proceedings to a two-day trial on 22 and 23 August 2011. Subsequently, the Court brought the trial dates forward to 4 and 5 August 2011. The parties sought, and the Court agreed, for the declaratory judgment proceedings to be heard by a Full Court, given the importance of the issues.

²⁶ *Re Earthquake Commission* [2011] 3 NZLR 695 (HC).

- 29 Once the High Court had confirmed the correct approach, EQC was left in the following position:
- a Where the cost of repairing the overall damage from all the earthquakes was less than EQC's cap of (typically) \$100,000, no apportionment was in practice required, because the whole of the damage would be covered under the Earthquake Commission Act;²⁷
 - b Where the cost of repairing the overall damage from all the earthquakes was more than EQC's cap of (typically) \$100,000, apportionment would be necessary to see whether the damage that had occurred as the direct result of any single earthquake exceeded EQC's cap:
 - i If one or more events were over the cap for an event (called 'over cap'), EQC would then need to cash settle the claims (rather than arranging for any repair work) including a cap payment for the over cap event. If the customer had top-up insurance with their private insurer, the private insurer would then take responsibility for the over-cap amount, subject to the terms of the private insurance policy.
 - ii If all events were under the cap for an event (called 'under cap') the whole of the damage would be covered under the Earthquake Commission Act and EQC could then proceed to settle the claim by payment, reinstatement or a combination of the two.

Operational practices developed by EQC

- 30 If EQC had assessed a residential building after each damage-causing earthquake, apportionment was relatively straightforward, because EQC had records of the damage that occurred in each earthquake. However, given the sheer volume of claims and the frequency of earthquake events, EQC was unable in many cases to collect this information before the next earthquake in the sequence happened. In these cases apportionment was more difficult.
- 31 EQC developed the Dwelling Repair Apportionment Standard Operating Procedure between August 2011 and April 2012 which set out the process for how EQC would apportion earthquake damage to each event.²⁸

²⁷ The question of how much damage occurred in each earthquake was still relevant to determining how to calculate the applicable excess for each EQC claim.

²⁸ See 'The Dwelling Repair Apportionment Standard Operating Procedure', Version 1.1, dated April 2012. This procedure was not formally signed off by EQC management. However, it was circulated, referred to and followed when completing an apportionment for a property. The procedure was developed over time by staff members involved in the apportionment process to address some ambiguities in the wording. The final version titled 'Residential Building Repair Apportionment Standard Operating Procedure', Version 1.7, dated February 2014 was also not approved by EQC management.

- 32 Around 2012, EQC started to face criticism from private insurers for the length of time that it took for EQC to complete its apportionment process and identify over cap claims to be handed over to the private insurer.
- 33 To respond to these criticisms and speed up the apportionment process, EQC developed a second standard operating procedure called the Dwelling Repair Apportionment Standard Operating Procedure – Geographical Allocation and Apportionment of Dwellings.²⁹ It involved apportioning damage using information on properties in close proximity to the subject property with similar construction characteristics and was generally used as a first time apportionment tool. If it resulted in an unreliable apportionment outcome then EQC referred to other information available to it.
- 34 The private insurer approach to apportioning damage was different to EQC and was also different between insurers. Possible reasons for this include:
- a private insurers only had information for their insured properties (whereas EQC had information relating to all insured properties);
 - b private insurers generally didn't have all available information about a customer's property for example, EQC's information;
 - c some private insurers insured a particular segment of the residential building market for example farming homesteads or mixed use (commercial/residential) multi-unit buildings; and
 - d often private insurers considered different information and/or gave different weighting to the same information.
- 35 If a private insurer challenged EQC about how it apportioned damage in a particular case, EQC generally focused on whether there was agreement on the assessment of damage and associated repair strategies. An example of this was the joint review process (see paragraphs 104 - 108 below). EQC would typically ask the private insurer to provide all information they considered was relevant regarding what event caused the damage.
- 36 EQC and private insurer's principles of apportionment have evolved throughout the Canterbury response as EQC and private insurers share the information that each other has and better understand the reliance each other places upon that information.

²⁹ The Dwelling Repair Apportionment Standard Operating Procedure - Geographical Allocation and Apportionment of Dwellings, dated December 2012, was developed between April 2012 and December 2012. This standard operating procedure was not formally signed off by EQC management but it was provided to staff to be used when completing a geographic apportionment.

- 37 The focus by both EQC and the private insurer to settle their (mutual) customer's claim, meant issues about the respective liability as between themselves (EQC and private insurer) for the cost of the claim were generally deferred to be resolved through insurer finalisation (see paragraphs 160 - 162 below). This approach occurred at different times in the Canterbury response for each private insurer dependent upon their priorities.

Canterbury – initiatives to manage the interface between EQC and private insurers

- 38 EQC's approach to managing the interaction with private insurers has evolved over time. From a claims assessment and settlement perspective, EQC's focus has consistently been on developing initiatives to:
- a identify claims that were over cap for an event and informing the private insurer of those claims as quickly as possible; and
 - b resolve any disagreement between EQC and the private insurer regarding their respective liabilities.
- 39 Many of the initiatives involve EQC balancing the tensions between:
- a the statutory framework within which EQC operates;
 - b managing claims fairly, transparently and in a timely manner for EQC's customers;
 - c EQC's relationship with each private insurer; and
 - d the scope of the reinsurance contracts and the need to maintain the confidence of its reinsurers.
- 40 An example of some of these tensions is EQC generally did not require its customers to enter into full and final discharge agreements when settling a customer's building claim.³⁰ Whereas it is common for private insurers to require their customers to do so when accepting the private insurer's settlement offer for a building claim under an insurance policy.³¹

³⁰ A full and final settlement discharge is a document signed by an insured party accepting that the party has received their full insurance entitlement and agreeing that the party will not seek any further insurance payment in relation to the settled claim

³¹ Sometimes, the requirement will be a term of the insurance policy or it may be framed by the private insurer as an offer to settle the relevant claim on terms more favourable than the policy provides.

- 41 EQC is obliged to settle the customer’s residential building claim “...to the extent to which it is liable under [the] Act”.³² Customers including those customers where an EQC claim(s) has been assigned can therefore reopen a previously settled EQC claim.³³ This has sometimes strained relationships between EQC and private insurers in relation to the changing numbers of reopened under cap EQC claims and in some cases, those claims subsequently being determined as being over cap.
- 42 EQC also had to engage with multiple private insurers. Each private insurer had a different way of working when it came to engagement with EQC regarding the assessment and settlement of individual claims and their respective liabilities. Each private insurer also had different requirements in respect of the notification of claims which exceeded the cap for an event and the way in which EQC reported on the volume of claims which had the potential to exceed the cap for an event. EQC’s initiatives were often adapted to account for the particular requirements of each private insurer which added to the complexity.
- 43 Impacts of the EQC and private insurer interface when addressing building claims fall within four key themes:
- a Information sharing between EQC and private insurers;
 - b Extent of cover under the Earthquake Commission Act; and
 - c The approach to the assessment of damage; and
 - d Identification of over-cap claims.

Information sharing between EQC and private insurers

- 44 The nature and extent of information sharing between EQC and private insurers both, at the time a policy of fire insurance is entered into, and once a claim is lodged and required assessment and settlement, is directly relevant to EQC’s ability to respond efficiently to a customer’s claim.

Chief Executive and operational engagement with the Insurance Council of New Zealand and private insurers

- 45 EQC’s Chief Executive³⁴ attended regular Chief Executive meetings led by the Insurance Council of New Zealand.

³² See section 29(2) Earthquake Commission Act.

³³ The nature of natural disaster damage is such that it is difficult in many cases to determine precisely the amount of that damage, and in these cases there will often be genuinely different views about what the correct settlement of the EQC claim should be.

³⁴ Correspondence between ICNZ and EQC’s Chief Executive and individual private insurers from 2013 to 2019.

- 46 EQC's Chief Executive and senior management also met regularly with individual private insurers to discuss issues particular to EQC's relationship with that private insurer.
- 47 Much of the correspondence focused on ways in which EQC and private insurers could better manage their respective insurance obligations to their customers, including many of the initiatives outlined in this briefing.
- 48 EQC also participated in working groups established from time to time to address particular issues. For example, in December 2011, the Regulatory and Consenting Working Group was established and chaired by the Canterbury Earthquake Recovery Authority.³⁵
- 49 The working group met once a fortnight and focused on regulatory issues such as resource and building consent processes and timeframes, the approach to the repair of foundations on Technical Category 3 land, the scope and method of land repair, and drainage. It also provided an opportunity for participants, particularly EQC and the private insurers, to engage on a wide range of other issues.³⁶
- 50 The working group continued until August 2012. At this point it was considered that the regulatory issues had been sufficiently resolved or were more suitably addressed by government agencies directly or at a technical level by the Engineering Advisory Group and the project management offices for EQC and each of the private insurers.
- 51 To allow communication between EQC and the private insurers to continue, the Insurance Council of New Zealand facilitated an Insurance Industry General Manager's meeting. Government and local government input into these meetings was by invitation. These meetings were useful to discuss any areas of contention, particularly differences in scoping damage, pre-existing damage and the level of cover available under the Earthquake Commission Act.
- 52 EQC also on occasion attended public meetings with individual private insurers.

Insurance verification

- 53 At an individual customer level, an 'insurance verification process' involved EQC verifying that the customer held a valid policy of fire insurance at the time of the damage causing event and the amount of EQCover available for that event.³⁷

³⁵ Participants of this Working Group included representatives from each of the private insurers, the Insurance Council of New Zealand, Tonkin and Taylor, the Department of Building and Housing, the Christchurch City Council, the Selwyn District Council and the Waimakariri District Council.

³⁶ See draft roadmap and schedule of issues and impediments to the residential rebuild prepared by the Regulatory and Consenting Working Group in January 2012.

³⁷ EQC and private insurers did not have a mechanism, such as a standardised unique identifier, to link claims to customers and properties. EQC developed a database to match its customers with its claims. This work is a further example of a time-consuming and resource-intensive process which diverted resources away from claim settlement but was required to ensure that EQC was able to immediately identify all claims applicable to a particular property.

- 54 For claims lodged by customers which arose from the Canterbury earthquake sequence, EQC's ClaimCenter automatically assigned an activity to obtain from the customer's private insurer all insurance policy details required to determine whether EQCover was available and if so, the extent of that cover. If EQC was not aware of the customer's private insurer then an insurance certificate was sent to the customer to complete with their private insurer.
- 55 EQC had to complete the insurance verification process each time a new claim for another event was lodged by the customer. When the customer's claims for a property were linked together,³⁸ EQC would often find that it was missing information or the information was inaccurate.³⁹ This resulted in more requests being sent through ClaimCenter to the private insurer.⁴⁰ For a more urgent verification, for example a settlement required for a vulnerable customer, EQC staff emailed or telephoned a specific individual at the private insurer for the required information.
- 56 It was EQC's preference to complete the insurance verification as the first step before proceeding further with the customer's claim. However, the time consuming nature of the task and the sheer volume of claims meant in Canterbury it often contributed towards delay in the progression of the customer's claim with EQC. In some cases, claims were allocated for a repair under the Canterbury Home Repair Programme before completion of the insurance verification process. In these cases, EQC took the risk that some of these properties might not have insurance cover or had a different level of EQCover than the usual cap of \$100,000.⁴¹
- 57 Although these initiatives allowed customers' claims to progress, it often shifted the 'bottleneck' to another point in the claims settlement process, such as the inability to cash settle earthquake damage which had not been repaired until the insurance verification process had been completed.
- 58 The insurance verification process was identified through the Value Stream Mapping (see paragraphs 132 - 133 below) process as the biggest constraint to claim settlement in or around 2012. As a result, a dedicated programme of work was put in place to expedite the insurance verification process. EQC and private insurers both increased the resourcing assigned to verification of insurance in an effort to clear the backlog.

³⁸ ClaimCenter operated by event and not by a property address so EQC had to manually link all claims made for each event together.

³⁹ For example, EQC often found that it had contrasting insurance information across claims covered by the same policy period.

⁴⁰ See the attached table which illustrates the type of verification issues that were occurring in or around 2013.

⁴¹ There were only a small number of claims that were repaired without completion of the insurance verification process which were later identified to have a lower cap per event or no cover at all.

59 Section 31A(1) of the recently enacted Earthquake Commission Amendment Act 2019 means in the future that EQC can now facilitate insurance verification as part of EQC’s preparedness for a future event.⁴² By way of example, potentially setting up a “live” data sharing system as between the private insurer and EQC which tracks the private insurer’s contracts of fire insurance and enables verification status to be known as soon as an event occurs.

ClaimCenter access

60 Shortly after the 4 September 2010 earthquake, EQC granted private insurers expanded access to ClaimCenter. This access allowed private insurers to update ClaimCenter records to verify that a valid policy of fire insurance was in place at the time of the earthquake event. It also allowed private insurers access to other records held within ClaimCenter such as EQC’s assessment records and scopes of work.⁴³

61 EQC continued to provide the private insurers with access to ClaimCenter following the 22 February 2011 event. EQC started to reconsider the extent of that access in early 2012. This arose as a result of a private insurer releasing information held by EQC to a customer which was yet to be communicated by EQC to the customer⁴⁴ along with other instances of private insurers not adhering to the agreement around ClaimCenter access. EQC was also conscious of the commercial risk of private insurers seeing what damage EQC had apportioned to each event.

62 In March 2013, data breaches resulted in EQC shutting down its publicly facing systems as well as access into EQC systems by external parties (including private insurer access to ClaimCenter).⁴⁵ From this date, private insurers’ access to ClaimCenter was reset and limited to certain functions the private insurer needed to perform such as the ‘insurance validation screen’ for the purposes of validating that a policy of fire insurance was in place at the time of each claimed earthquake event. EQC also had the ability to switch off access if EQC found that information had been accessed inappropriately.

⁴² It enables all information (personal and property related) to be collected for response, recovery and preparedness purposes. It can also be disclosed and used for that and the purposes set out at section 31A(1).

⁴³ See Briefing to the Public Inquiry into the Earthquake Commission, *Earthquake Commission Data*, dated 1 April 2019 at paragraphs 42 – 44.

⁴⁴ See draft Executive Leadership Team paper titled ‘*Insurers’ EQC Customer Information and Access Rights Decision Document*’ dated 21 February 2012 which proposed that private insurers’ access to ClaimCenter was limited to what was necessary to enable private insurers to ensure customer and claim information is correct and associated recommendations for the implementation of the change in access. See also minutes of ELT meeting on 27 February 2012.

⁴⁵ See KPMG ‘*Review of Privacy Breach – March 2013*’ dated August 2013 (report #17 listed in Appendix A of Briefing to the Public Inquiry into the Earthquake Commission ‘*External Reviews of EQC since 2010*’ dated 4 March 2019).

- 63 If private insurers required further information from EQC such as EQC’s assessment of damage and associated scope of work then this information had to be requested from EQC. EQC generally only disclosed customer information to the customer’s private insurer or other third parties if a customer consented to disclosure (expressly or by implication), or if that disclosure was necessary for the purposes of assessing and settling the customer’s EQC claim,⁴⁶ for example when EQC considered the customer’s claim was likely to exceed cap for an event.⁴⁷

Data capture provided to private insurers

- 64 In September 2013-2014 most private insurers entered into a confidentiality agreement with EQC so that EQC could provide, and private insurers could use, data sets from EQC for planning purposes.
- 65 In August 2014, the Insurance Council of New Zealand approached EQC raising concerns about the high number of over cap claims private insurers were receiving from EQC and that the private insurers had no visibility of these claims until they were notified by EQC. In September and October 2014, EQC provided many private insurers that had signed confidentiality agreements with data, intended to provide a complete picture of customer claims at that point in time to assist each private insurer to determine the capacity they needed to resolve their Canterbury claims.⁴⁸

Scope of cover under the Earthquake Commission Act

- 66 There are many areas of regular debate between EQC and private insurers as to the nature and extent of cover under the Earthquake Commission Act (if any) and the private insurers’ corresponding liability. The customer, in most cases, ultimately had cover either under the Earthquake Commission Act or under their private insurance policy but settlement of their claim (or an aspect of their claim) was delayed until such time as EQC and/or the private insurer agreed who between them was responsible.

⁴⁶ See Principle 11, exception (a) of the Privacy Act 1993 which provides that personal information may be disclosed for a purpose in connection with which the information was obtained or a directly related purpose. EQC considered that almost all information it held about a customer or their claim was personal information. See EQC’s policy “The Release of claims information” dated 19 February 2010 and EQC’s Privacy Policies (various iterations from February 2013 - 2019).

See also some relevant decisions of the Privacy Commission: <https://privacy.org.nz/news-and-publications/case-notes-and-court-decisions/case-note-228045-2012-nz-privcmr-8-woman-requests-geotechnical-property-report-from-a-council-s-insurance-company/> and <https://www.privacy.org.nz/assets/Uploads/Advisory-opinion-for-NZFS-28AO-001-201630.pdf>

⁴⁷ The Earthquake Commission Amendment Act 2019 now enables EQC to share information about all claims with the relevant private insurer.

⁴⁸ See letter from ICNZ to EQC dated 22 August 2014, EQC to ICNZ dated 17 September 2014 and associated letters to individual private insurers.

- 67 To assist private insurers⁴⁹ with the particulars of EQCover and premiums, EQC has for many years published a guide entitled *EQCover: An Insurer's Guide*⁵⁰ (known as the "Insurer's Guide") which includes information on:
- a what is and is not covered under the Earthquake Commission Act;
 - b caps and excesses;
 - c the claims process;
 - d assessing the amount of EQCover;
 - e premiums payable by private insurers;
 - f EQCover direct with EQC; and
 - g cancellation of EQCover.
- 68 While the Insurer's Guide is a helpful resource, it requires regular updating to keep it relevant.

Private insurers' interest in EQC's settlement of damage to residential land

- 69 Private insurers are interested in the extent to which any land damage and EQC's corresponding liability might impact on the extent of their liability in respect of damage to the residential building. In the event of debate between EQC and the private insurer on this issue, the customer's claim can be delayed.
- 70 The repair of residential building damage can affect any repairs required for land damage, and vice versa, particularly in circumstances where a house (or its foundations) are rebuilt. For example, minor visible land damage can be incidentally repaired in the course of building work on the property.⁵¹
- 71 On 20 January 2017, IAG New Zealand Limited and Tower Insurance Limited commenced High Court proceedings against EQC in respect of EQC's policy for settling Increased Liquefaction Vulnerability land damage.⁵² These proceedings are ongoing.
- 72 As a result of the private insurer claims, over 300 customer land claims were put on hold in 2016. Most claims have recently been progressed and settled with customers.

⁴⁹ The Insurer's Guide is also used by insurance brokers.

⁵⁰ The guide may be found at this link: https://www.eqc.govt.nz/sites/public_files/documents/EQCover/EQCover-Insurers-Guide-2017.pdf.

⁵¹ For more information about visible land damage, see the Briefing to the Public Inquiry into the Earthquake Commission, *Canterbury Land Programme*, dated 24 May 2019 from para 82.

⁵² See Briefing to the Public Inquiry into the Earthquake Commission, *Canterbury Land Programme*, dated 24 May 2019 at paras 262 – 265.

Personal property/contents claims

- 73 Contents cover under the Earthquake Commission Act was largely untested prior to the Canterbury earthquake sequence so there was limited historical precedent to draw on. EQC had to consider a range of questions around the nature and extent of cover under the Earthquake Commission Act. This often necessitated EQC making enquiries with both the customer's private insurer and the customer regarding policy terms and particular factual scenarios. Customers were often caught in the middle of debate between EQC and private insurers as to who was responsible for cover of particular items.⁵³
- 74 EQC dedicated significant time and resource to the settlement of contents claims in the months following each of the damage causing Canterbury earthquake events to enable customers to purchase replacement items as quickly as possible.

Scope of residential building cover

- 75 Whether a building in question meets the definition of "dwelling" and/or residential building⁵⁴ is important to determine whether EQCover applies or whether a private insurer may be responsible under its policy to settle the customer's earthquake damage to the building.
- 76 An example of a few cover issues:
- a When did a dwelling cease to be capable of being a home (where for example it is dangerous and unsanitary but still being lived in (and still being insured by the private insurer)) or when it is in the course of repair and temporarily unavailable? This was particularly relevant given the number of damage causing earthquakes in Canterbury and apportioning damage to an event.

If EQC did not consider the building met the requirements in the Earthquake Commission Act for a particular event, no EQCover was available and the private insurer may be liable dependent upon the terms of the policy. It was possible there was EQCover for one event but not another. Discussion needed to be had for EQC and private insurers to share information with each other and resolve who was responsible for addressing the customer's claim for damage in such cases.

- b What was the meaning of "if the area of the dwelling or dwelling(s) constitutes 50 percent or more of the total area of the building, part, or structure⁵⁵"? What is a "part of the building" – a floor, part of a floor?

This has often proven an area of contention in mixed use (commercial and residential) buildings. For example, an apartment and shop comprise the entire ground floor of a multi-storey building on one separate unit title. The rest of the building is used for

⁵³ The removal of cover for personal property from July 2019 means that these issues are less topical for future events.

⁵⁴ As defined in section 2 of the Earthquake Commission Act.

⁵⁵ Section 2(1) Earthquake Commission Act "residential building" para (a).

commercial purposes. The ground floor would satisfy the test for “residential building” where the apartment makes up for 50% or more of the total area of a part of the building (the ground floor unit). That part can have EQCover⁵⁶ notwithstanding that some of that part of the building may be for commercial use (for example a shop).

If the apartment did not comprise more than 50% of the ground floor unit, the apartment itself would satisfy the test for “residential building” because it is a dwelling and makes up 50% or more of the total area of a part of the building (the area of that dwelling). EQC and private insurers again needed to work with each other to resolve the extent of each other’s liability in order for a customer claim to progress.

- c Whether boarding houses constituted a dwelling⁵⁷ and therefore attracted EQCover?

In September 2012 the High Court determined that the particular boarding house subject to the proceedings constituted a dwelling for the purposes of cover under the Earthquake Commission Act.⁵⁸ Many customers had to wait until after the outcome of the High Court judgment to have their claims settled unless the private insurer had elected to settle the claim and recover any contribution from EQC at a later date.⁵⁹

Assessment of damage

- 77 EQC and private insurers often debate the nature and extent of the earthquake damage, the required repair strategy, the cost of that repair strategy and the apportionment of that damage across damage causing events. The debate is necessary to determine the amount of damage and whether the damage to the residential building is under or over EQC’s cap (what EQC and private insurers’ liability is to their customer).
- 78 Debate on these issues is complex and time consuming and often requires EQC and the private insurers to engage specialist technical input, such as input from structural and geotechnical engineers. Even where there is specialist technical input, EQC and private insurers may continue to have different views on these issues.
- 79 For customers, this debate between EQC and private insurers meant that they often received conflicting information from EQC and their private insurer on issues relating to the assessment and repair of earthquake damage and whether their claim was above the cap for an event. While it is not strictly necessary for EQC to reach agreement with the customer’s private insurer before settling its liability, to do so without the agreement of the private insurer often meant that the private insurers required further engagement with EQC before resolving their liability with the customer.

⁵⁶ Assuming all other requirements under the Earthquake Commission Act are met.

⁵⁷ As defined in section 2 of the Earthquake Commission Act.

⁵⁸ *Morley v Earthquake Commission* [2013] NZHC 230.

⁵⁹ This occurred in a small number of cases.

- 80 Often the process for resolving any debate between EQC and the private insurers resulted in both EQC and the private insurers carrying out multiple assessments of the customer's property, which was likely another source of frustration for customers.

Post 4 September 2010

- 81 In the days immediately following the 4 September 2010 Canterbury earthquake, EQC engaged with the Insurance Council of New Zealand and representatives of many of its private insurer members to discuss protocols for responding to claims arising out of this event. A memorandum circulated by the Insurance Council of New Zealand⁶⁰ recorded the following amendments to the draft protocol that had been prepared in April 2010⁶¹:
- a Reaffirmed the decision by EQC that it could not accept private insurers assessing residential building claims that fell below the EQC cap but would accept a private insurer's schedule of contents damage below the EQC cap;
 - b Where the private insurer assessed a residential building and determined that the damage exceeded the EQC cap then the private insurer could send a copy of its damage assessment and scope of works to EQC and EQC would arrange for the cap payment to be made to the customer;⁶²
 - c If EQC assessed a residential building and determined that the damage exceeded the EQC cap then it would arrange for the cap payment to be processed and notify the private insurer so that the private insurer could proceed to settle the over cap claim; and
 - d Private insurers could complete emergency works to their customers' properties and EQC would reimburse those costs but only once EQC had confirmed acceptance of the emergency works claim and the costs to be incurred.

9(2)(h)

⁶¹ The draft protocol titled "Protocols for Claims Handling" was provided to four private insurers (IAG New Zealand Limited, Tower Insurance Limited, Vero and AMI) in April 2010. However, at the time of the Canterbury earthquakes these private insurers were yet to sign the protocol. The draft protocol provided for private insurers to have access to EQC's claims management system, the exchange of information and future handling of claims.

⁶² EQC acceptance of a private insurer's over-cap assessments following the 4 September 2010 event initially occurred with limited audit of the private insurer's damage assessment records. Following some audits of the private insurer's assessments EQC found that some assessments did not contain sufficient detail for EQC to accept that the damage was over-cap. For example, many assessments were rebuild estimates prepared for private insurer's reserve setting and did not reflect an accurate scope.

Post 22 February 2011

- 82 EQC started to move away from using the draft protocols as the volume and complexity of claims arising from the 22 February 2011 earthquake, in addition to claims arising from the 4 September 2010 earthquake, required reconsideration of the way in which it collaborated with the private insurers, particularly in respect of damage assessments.
- 83 In or around April 2011, EQC confirmed with the Insurance Council of New Zealand that it would be willing to accept private insurers' assessments of claims arising from the 22 February 2011 event.⁶³
- 84 At the same time, EQC also discussed with the Insurance Council of New Zealand an arrangement with private insurers which would involve them carrying out emergency works following the 22 February 2011 earthquake up to \$50,000. A formal agreement was drafted but it was never signed by EQC.⁶⁴ However, EQC considered the arrangement to be in effect until May 2012. Some private insurers did carry out emergency works under this arrangement.⁶⁵

Protocol 1

- 85 In November 2011, EQC and private insurers entered into a protocol known as "Protocol 1".⁶⁶ Protocol 1 was one of the most significant initiatives agreed between EQC and private insurers to improve the efficiency of Canterbury building claim settlements. It set out procedures for EQC and the private insurers to adhere to in the following situations:
- a Where the cost of the repair of a property by EQC through the Canterbury Home Repair Programme was initially thought to be under cap, but it subsequently (either prior to or part way through the repair) was expected to go over cap.
 - b Where claims originally assessed as being over cap were subsequently determined to be under cap either prior to or part way through the repair work.
 - c Where claims were assessed by EQC as being under cap but the customer contacted their private insurer to say that the earthquake damage was over cap.

⁶³ <http://www.stuff.co.nz/the-press/news/christchurch-earthquake-2011/4930192/EQC-lets-insurers-do-many-quotes>

⁶⁴ The draft agreement was titled 'Urgent Residential Make-Safe/Weathertightness Repairs for Under-Cap Claims – EQC/Insurer Agreement Protocol'. This draft was later amended to 'EQC/Insurer Agreement Protocol 3 Urgent Residential Make-Safe/Weather Tightness Repairs for Under-Cap Claims' and was commonly referred to as 'Protocol 3'. An email exchange between EQC and IAG dated 14 April 2011 records the process IAG would follow in respect of the completion of emergency works.

⁶⁵ In or around February 2014, EQC's executive leadership team agreed that reimbursement for emergency works under the arrangement would be considered as part of the insurer finalisation process between EQC and private insurers at the conclusions of the response to the Canterbury earthquake sequence. See paper to EQC's Executive Leadership Team titled '*Insurer Protocol 3 – Urgent Works*' dated 5 February 2014 and associated minutes of the meeting of the Operations Sub-Group on 11 February 2014 which records the decision to reimburse private insurer invoices.

⁶⁶ See Canterbury Earthquake Protocol 1 signed by EQC and ICNZ (11 November 2011) and EQC letter to ICNZ dated 31 July 2018.

- 86 Protocol 1 also set out a three stage dispute resolution process in cases where there was disagreement between EQC and the private insurer as to the amount of earthquake repair works required. The parties could also agree that other disputes arising out of the operation of protocol 1 were resolved in accordance with this process.
- 87 The most common scenario captured by protocol 1 was where the cost of the repair of a property by EQC through the Canterbury Home Repair Programme was initially thought to be under cap for each event, but after repairs had commenced were found to be over cap or likely to go over cap for an event. These properties were known as ‘protocol 1 properties’. To ensure no disruption to the customer, protocol 1 set out a procedure which involved:
- a EQC continuing to the repair the property (even though the cost was going to go over cap); and
 - b The private insurer reimbursing EQC for the over cap amount at a later date.
- 88 Earlier on in the Canterbury Home Repair Programme, loss adjusters working for EQC were generally the main contact for both EQC staff and private insurers for any protocol 1 properties.⁶⁷ Notification of protocol 1 properties (where made) commonly occurred by email to the private insurer. Notification may not have been made for a range of reasons, such as:
- a the focus of the Canterbury Home Repair Programme was repairing houses so that customers could live in a repaired home as soon as possible rather than on rigid adherence to protocol 1 procedures;
 - b there was a general understanding amongst those working in the Canterbury Home Repair Programme hubs that an agreement existed between EQC and private insurers for when the cost of repairing the property exceeded cap for an event. However, there was not a clear understanding of how protocol 1 worked in practice;
 - c a property was often only identified as being over cap for an event after all repairs had been completed and those costs apportioned across the relevant event(s). EQC prioritised apportioning earthquake damage claims that it was cash settling (or claims it was settling by a mixture of cash and repair). Claims were referred to the Canterbury Home Repair Programme generally because EQC’s original damage assessment and total repair estimate was less than \$80,000⁶⁸, or was above \$80,000 but apportioned and confirmed as under cap.⁶⁹

⁶⁷ Originally, the Canterbury Home Repair Programme organised up to 22 hub offices in the areas affected by the earthquakes. The number of hub offices decreased over time as repairs progressed. In 2012 there was generally one EQC loss adjuster in a hub or across two hubs. Towards the end of Canterbury Home Repair Programme there were only two loss adjusters across the four remaining hubs.

⁶⁸ Not apportioned given the cumulative repair cost was under \$80,000.

⁶⁹ The repair estimate was often revised when the residential building was scoped through the Canterbury Home Repair Programme process before repairs commenced. On occasion, the revised repair estimate exceeded \$100,000. In

- 89 In 2013 EQC implemented the ‘EQC / Insurer Agreement – Protocol one, handing over reinstatements which were incorrectly assessed as over or under cap’ to assist EQC staff working on protocol 1 properties and provide guidance on the process for notifying protocol 1 properties to the private insurer.
- 90 Prior to this, EQC did not have a documented internal procedure. If a property was identified as a protocol 1 property following apportionment, then this standard operating procedure was generally followed. In other cases, EQC’s loss adjusters continued to approach private insurers directly to notify the private insurers of protocol 1 properties and discuss reimbursement of any over cap amounts incurred by EQC.
- 91 Private insurers also developed their own monetary thresholds in excess of EQC’s cap to which they were happy for EQC to continue with repairs to the residential building without EQC having to notify them in accordance with protocol 1. The private insurer would agree to reimburse EQC up to that monetary threshold. In other cases private insurers chose to only carry out a desktop review of the assessment and construction information to determine the extent of their over cap liability and whether EQC should continue with repair (rather than needing to attend a site visit of the property).

“De facto” Protocol 1

- 92 There were other Canterbury claim scenarios not specifically referred to in protocol 1 where EQC applied the principles of protocol 1 and also referred to them as protocol 1. For the purposes of distinguishing these from properties envisaged by the original Protocol 1 agreement, they are referred to for the purposes of this briefing as ‘de-facto protocol 1’s’.
- 93 One scenario was where the customer chose to opt out of the Canterbury Home Repair Programme and repair the earthquake damage using their own contractor.⁷⁰ There were occasions where opt out customers requested additional cash settlement payments from EQC to cover the cost to repair additional earthquake damage discovered during the course of their repair or the cost associated with a change to the original repair strategy. On occasion, an additional cash settlement payment by EQC resulted in the property going over-cap for an event. EQC generally followed the principles of protocol 1 when settling such claims. This approach avoided customers having to delay the progress of their repair works while they engaged with their private insurers to obtain the over-cap portion of the repair cost.

approximately mid/late 2014, EQC developed a possible over-cap process for such cases. This involved claims being placed on hold with the Canterbury Home Repair Programme and returned to EQC for apportionment review based upon the revised scope of works, to determine whether the property remained under-cap or was now over-cap for an event. If under-cap, the property was taken off hold and repaired through the Canterbury Home Repair Programme. If over-cap, the hub was advised to stop any action through a “Project Management Officer (PMO) stop list” and the property was cash settled and handed to the private insurer. If repairs had already commenced, then the hub loss adjuster would generally initiate protocol 1 discussions with the private insurer.

⁷⁰ See the Briefing to the Public Inquiry into the Earthquake Commission, *The Canterbury Home Repair Programme*, dated 24 June 2019 at paras 168 - 172.

- 94 A second scenario was where EQC re-opened a claim because there were additional works required to address missed earthquake damage and/or an incorrect repair strategy after substantive under cap repairs were completed through the Canterbury Home Repair Programme and the total cost of the additional works and the valid first time repair works was over cap for an event. For these cases, EQC obtained the private insurer's agreement in writing that the property could be treated as a protocol 1 property, with the private insurer reimbursing EQC for the repair costs incurred by EQC above the cap. EQC did so prior to EQC commencing the repair of the customer's property. If agreement couldn't be reached between EQC and the private insurer, EQC cashed settled the customer up to the relevant cap.

Protocols 2 to 5

- 95 In addition to protocol 1, there were four other protocols which were applied by EQC and the Insurance Council of New Zealand in the context of the Canterbury earthquakes:
- a PROTOCOL 2 - the private insurer could organise minor re-levelling and land compacting works which were required before a rebuild or over cap repair could commence. EQC agreed to indemnify the private insurers and/or the private insurer's contractors within 30 days of receipt of an invoice for such works.
 - b PROTOCOL 3 – (see paragraph 84 above) recorded the earlier agreement of private insurers carrying out emergency works up to \$50,000.
 - c PROTOCOL 4 – EQC accepted a private insurer's assessment of contents claims, subject to the private insurer providing or retaining particular information in a standard schedule format containing EQC's covered items to a total of \$20,000. EQC would pay carpets, drapes and other contents that were unable to be accessed upon confirmation by the private insurer that the building (and contents if relevant) would be demolished (and there was no possibility of salvage).
 - d PROTOCOL 5⁷¹ – explains the circumstance surrounding EQCover for certain property forming part of or within the vicinity of the residential building – including verandas, decks, patios and other property of a similar nature (paving, pergolas, concrete slab and fences). It also outlined the process for dealing with situations where damaged property had been assessed inconsistently with the protocol.

TC3 drilling programme

- 96 In 2012, EQC (with the assistance of its engineers, Tonkin & Taylor) began a drilling programme on land in Canterbury within the Technical Category 3 Zone (TC3). Properties on land designated as TC3 have the potential for moderate to significant damage from liquefaction in future

⁷¹ Some draft versions refer to it (in error) as being protocol 6.

significant earthquakes. Due to the potential for damage, it was decided that further geotechnical investigation was needed to assess localised soil conditions of TC3 land and ensure that house foundations in need of repair or rebuild on TC3 sites were designed to lessen the risk of future earthquake damage.⁷²

- 97 EQC began preparing for the undertaking of a Drilling Programme in November of 2011, and invited private insurer representatives to a forum in January 2012 to discuss a collaborative approach. The information obtained through the Drilling Programme would help EQC and private insurers to determine the required foundation repair or replacement and the cost of that work. Numerous discussions were subsequently had with private insurers both individually, and as a group about how a collaborative approach might operate.⁷³
- 98 In March 2012, the Insurance Council of New Zealand engaged engineering consultancy firm Synergine Group Limited to suggest a proposal for how a collaborative programme would work. Synergine proposed that participating private insurers and EQC would be involved in a buyer group and a cost sharing model based on their relative market shares. The proposal did not specifically outline the share of the programme costs that EQC should bear. This was of concern to EQC and also led to debate between EQC and private insurers.⁷⁴
- 99 After around six months of debate, EQC and private insurers were not able to reach agreement on how a collaborative approach would operate. EQC's Board decided that EQC should go ahead with its own drilling programme.⁷⁵ Some private insurers pursued separate drilling programmes simultaneously.⁷⁶ Other private insurers agreed to purchase the data produced by EQC.⁷⁷
- 100 While EQC had commenced its own drilling programme, EQC continued to support collaboration with private insurers for the benefit of shared customers.⁷⁸ EQC also continued to support the development and maintenance of the Canterbury Geotechnical Database and the sharing of specialist land information.⁷⁹

Private insurers' agreements with customers

- 101 In some cases private insurers entered into a deed of assignment with their customer. The deed of assignment often provided that the private insurer would settle the customer's claims on the basis that the customer assigned any residual benefits in their EQC claims or certain aspects of the customer's EQC claims to the private insurer.

⁷² https://www.eqc.govt.nz/sites/public_files/documents/Canterbury/TC3-factsheet-Sept2012.pdf

⁷³ See memorandum from the Chief Executive to the EQC Board dated 4 September 2012.

⁷⁴ See memorandum from the Chief Executive to the EQC Board dated 4 September 2012.

⁷⁵ See EQC Board minutes dated 12 September 2012.

⁷⁶ Information sheet for EQC call centre hubs on the TC3 Drilling Programme.

⁷⁷ Executive Leadership Team Minutes dated 30 July 2012.

⁷⁸ See memorandum from the Chief Executive to the EQC Board dated 4 September 2012.

⁷⁹ See Briefing to the Public Inquiry into the Earthquake Commission, *Canterbury Land Programme*, dated 24 May 2019 at para 226(f) - 228.

- 102 Private insurers often entered into a deed of assignment with the customer if the private insurer believed there was an outstanding liability to be paid by EQC. EQC would then deal with the private insurer (as if they were the customer) in relation to any unsettled aspects of the assigned claims.
- 103 Some private insurers took a differing approach and entered into a full and final settlement agreement with their customers less the amount that the private insurer considered to be EQC's liability. This approach had the potential to result in a financial shortfall for customers in cases where EQC did not agree with the private insurer's assessment of its liability. For example, if EQC determined \$30,000 of earthquake damage occurred in September 2010 and damage exceeded EQC's cap in February 2011 but the private insurer considered \$80,000 damage occurred in September 2010 and damage exceeded cap in February, the customer was left with a shortfall of \$50,000 to repair the damage with the ability only to challenge EQC's determination given the agreement entered into with their private insurer.

Joint review

- 104 There was often a difference of opinion between EQC and private insurers around matters such as:
- a Whether or not an element was earthquake damaged or had pre-existing damage;
 - b The repair strategy; and
 - c The cost of that repair strategy.
- 105 The differences in opinion on these matters often led to a disparity between the private insurer's assessment and EQC's assessment of their respective liabilities.
- 106 The joint review process⁸⁰ was set up by EQC and private insurers in approximately January 2012 and was in operation until late 2015. The joint review process facilitated resolution of claims where EQC and private insurers had disparate views and provided a pathway for resolution of the claim on the basis of the information available at the time. In the majority of cases, a request for a joint review was initiated by the customer's private insurer. This was because customers often approached their private insurer where they did not agree with EQC's assessment of the earthquake damage and required repair. The private insurer also often held new information which contributed towards resolution.

⁸⁰ Insurer Joint Review Process map, Joint Review Frequently Asked Questions, Joint Review process. <https://www.eqc.govt.nz/canterbury-earthquakes/claims-assessment/more-on-assessments/joint-review>

- 107 Once a joint review had been requested:
- a Staff from both EQC⁸¹ and the private insurer completed a desktop review of all paperwork and, if required, visited the property to try and reach agreement on the scope of earthquake damage. Both parties then completed a revised assessment of earthquake damage, repair scope and repair cost estimate;
 - b The customer's claim(s) were then apportioned based upon the new repair cost estimate to determine EQC's settlement position. EQC advised the customer's private insurer of the apportionment outcome and its settlement position.
 - c The private insurer would confirm with EQC whether it agreed or disagreed with EQC's settlement position. If the private insurer agreed, EQC proceeded to settle the customer's claim(s). If the private insurer disagreed, the private insurer provided further detailed information about the areas of agreement and disagreement. If required, further technical input was sought to reach resolution.
 - d If EQC identified that it had further liability, EQC settled the customer as required and notified the private insurer.
- 108 The vast majority of properties that went through joint review process were able to be resolved, providing the customer with certainty over payments and who was responsible for the repair of their home. Approximately 5,726 properties went through the joint review process.

Assessment and settlement of multi-unit buildings

- 109 The buildings damaged by the Canterbury earthquakes included a number of multi-unit buildings insured by EQC. For example, apartment buildings or large buildings divided into flats. Cover under the Earthquake Commission Act extends to buildings that contain one or more "dwellings". Cover may be for the whole of the building, or only part.⁸²
- 110 There were a number of complexities identified with the settlement of EQC claims for multi-unit buildings, including:
- a circumstances where each dwelling was insured through a separate insurance policy, often with different private insurers (and with no central record of which private insurer insured each dwelling) and/or some dwellings were uninsured;
 - b buildings with a mixture of residential and commercial (or other non-residential) uses;

⁸¹ EQC staff involved in the joint review process were part of EQCs insurer joint review team (also known as the insurance resolution team).

⁸² See paragraph (a) of the definition of "residential building", section 2, Earthquake Commission Act.

- c rest homes and retirement villages, with complex ownership structures and configurations;
 - d vulnerable owners without the means to collaboratively manage the repair of a large building; and/or
 - e pre-existing issues that could impact on earthquake repairs, such as “leaky building syndrome”.
- 111 The most significant of these issues (in terms of their impact on EQC settlements) were the circumstances where EQC insured only part of the building, or insured several parts separately. (such as, a building with five floors that are self-contained apartments and two floors are used as an office and a retail shop). In these cases, it was necessary for EQC to determine how to allocate the cost of the repair between the parts. This led EQC to develop separate settlement policies for multi-unit buildings and to collaborate with private insurers on the approach to settlement of the claims relating to multi-unit buildings.⁸³
- 112 Collaboration between EQC and private insurers on multi-unit buildings was primarily through a project called the “Shared Property Project”. This project was put in place to facilitate the settlement of multi-unit buildings which were insured by multiple insurers, including EQC claims that remained under cap. A process was established throughout 2013 – 2015 where a single lead insurer would coordinate the repair or rebuild of a qualifying multi-unit building, with the other insurers (and EQC) contributing their share of the overall settlement.
- 113 The process established by the Shared Property Project is recorded in a contract between EQC and private insurers dated 10 August 2015.⁸⁴
- 114 Template construction contracts were also prepared for each lead private insurer, with specific provisions covering EQC (where applicable).⁸⁵

⁸³ Through a Board paper dated 10 February 2014, the Board agreed that EQC could negotiate for the private insurers to act as the lead insurer on multi-unit building repairs. See also Minutes of the Board meeting on 17 February 2014 in which the Board also:

- Noted Management decisions enabling the majority of multi-unit properties in the Canterbury Home Repair Programme range to be released to Fletcher EQR and EQC continued to work with Fletcher EQR to find ways to make it easier to identify and progress these properties;
- Confirmed Management continued to exercise its discretion to approve cash settlement in a small number of cases; and
- Noted potential legacy risks with some multi-unit buildings already repaired through the Canterbury Home Repair Programme.

⁸⁴ See Shared Property Process Insurer Contract dated 10 August 2015 between AA Insurance, ACS (NZ) Limited, EQC, Farmers’ Mutual Group, IAG New Zealand Limited, Lumley, Medical Assurance Society, QBE, Southern Response, Tower and Vero.

⁸⁵ See example template Building Contract to be completed to be completed by the owners of a multi-unit building and the chosen contractor prior to commencement of repair works.

- 115 In April 2014 MBIE released some guidance for homeowners on the repair and rebuild of multi-unit buildings.⁸⁶ This guidance also provided some assistance to the parties involved in the Shared Property Project.
- 116 EQC developed a number of standard operating procedures for the assessment and settlement of different categories of multi-unit buildings in accordance with the Shared Property Project.⁸⁷
- 117 The Shared Property Project is a good example of collaboration and communication between EQC and private insurers to achieve settlement for complex building claims.

Drainage

- 118 EQC was conscious that earthquake damage to residential drains was not always readily apparent. If EQC was aware there was earthquake damage to drains at the time substantive repair works to the customer's home were carried out through the Canterbury Home Repair Programme, the drains were repaired at the same time. If the managed repairs were able to be carried out independently of the drainage works, EQC often scheduled such works as what was known as a 'secondary tab' (similar to garages) to be settled at a later date. The priority being, repairing customer's homes.
- 119 EQC decided in late 2015 to cash settle any drainage works.⁸⁸ In a small number of cases where EQC had repaired a customer's home through the Canterbury Home Repair Programme and the cash settlement of the drainage works meant the customer's claim went over EQC's cap for an event, EQC would approach the customer's private insurer and if the private insurer agreed to reimburse EQC, EQC would pay the amount (up to a maximum of \$10,000) in excess of EQC's cap.
- 120 This arrangement was put in place in an effort to avoid any delay and disruption to customers by having to engage with their private insurer solely in relation to drainage damage. It also avoided duplication of resources where EQC had already scoped the liability in excess of EQC's cap attributable to the drainage damage.

⁸⁶ See <https://www.building.govt.nz/assets/Uploads/building-code-compliance/canterbury-rebuild/multi-unit-residential-buildings/canterbury-mub-booklet.pdf>

⁸⁷ Copies of these standard operating procedures can be provided if required.

⁸⁸ See ELT paper dated 1 September 2015 "Solutions for settlement of Canterbury drainage claims" and minutes dated 07 September 2015

Current initiatives

CASH EXTENSION OF PROTOCOL 1 WITH IAG AND TOWER

- 121 In 2018 EQC engaged in a pilot process with IAG and Tower that enabled EQC to make cash settlements in excess of its statutory cap and seek reimbursement of the over cap amount from the private insurers at a later date (up to \$140,000 for IAG and up to \$150,000 for Tower).
- 122 The pilot process enabled EQC and the private insurer to resolve their respective liabilities to the customer. EQC then worked with IAG and Tower to recover the sums paid to the customer above EQC's cap.
- 123 A small number of claims were resolved using the pilot process. EQC found that this initiative was generally only useful for more straightforward claims which did not require complex discussions regarding the extent of EQC's liability. EQC also found that it took time to engage with the private insurer to agree the exact amount of the private insurer's contribution and resulted in a delay in EQC paying its liability to the customer.
- 124 A draft agreement was prepared to formalise the pilot process but was not signed by IAG and Tower. This was because claims suitable for a protocol 1 cash extension process had already been identified and resolved through the pilot process. For claims above EQC's cap for an event, EQC continues to pay to cap and then passes the claim to the private insurer to address any over cap portion of the claim.⁸⁹

PROTOCOL 7 – DISCUSSIONS FOR A PROTOCOL FOR STORM AND FLOOD EVENTS

- 125 In August 2018, EQC's Board agreed to EQC entering into negotiations with the Insurance Council of New Zealand to implement a protocol (referred to as 'protocol 7') for private insurers to manage the removal of silt and debris from under dwellings in future storm and flood events on EQC's behalf.⁹⁰ One of the key intentions of the negotiations was to create a seamless customer experience by the customer having to correspond only with their private insurer regarding settlement of land and building damage arising from a storm or flood event.
- 126 In November 2018 EQC and the Insurance Counsel of New Zealand entered into an agreement titled 'EQC/Insurer Agreement for Flood Events – Management for the Removal of Silt and Debris under Dwellings for EQC Land Claims'. This agreement is intended to be a trial activated by EQC on an event by event basis.

⁸⁹ The Governance and Administration Committee 2017/2018 Annual Review refers to EQC having a number of initiatives in place including legal and cash settlement protocols. This is a reference to the protocol 1 cash extension pilot process with IAG and Tower as well as a reference to the Southern Response Memorandum of Understanding.

⁹⁰ For storm and flood events EQC covers land damage only. Building and contents is covered by the private insurer. Therefore, without protocol 7, customers had to separately deal with both EQC and their private insurer. See EQC Board Paper titled '*Protocol 7 arrangement between EQC and the Insurance Council of New Zealand*' dated 7 August 2018.

- 127 To date protocol 7 has not been activated. There are some operational steps which EQC needs to put in place to ensure that protocol 7 can be effectively implemented on the occurrence of a future storm or flood event. These operational steps include engaging with the private insurers to reach agreement on information exchange, pricing, future liability for any damage arising from removal works, health and safety responsibilities, EQC excess collection and training on the boundary between cover under the Earthquake Commission Act and private insurance cover. EQC is also currently considering the merits of including the principles of protocol 7 into a potential wider agency relationship with private insurers.

BUILDING PRICING PILOT

- 128 EQC is currently operating the building pricing pilot to test whether continuity of repair scopes and costing between EQC and the private insurer can be improved. This is done by EQC engaging at an early stage with a building contractor recommended by the private insurer to scope (with input from EQC engineering resource where required) and cost the repair.
- 129 The building pricing pilot is an example of EQC exploring ways in which resources required by EQC and the private insurers to scope and price natural disaster damage can be aligned to reduce disagreement between EQC and the private insurers on scope and price.

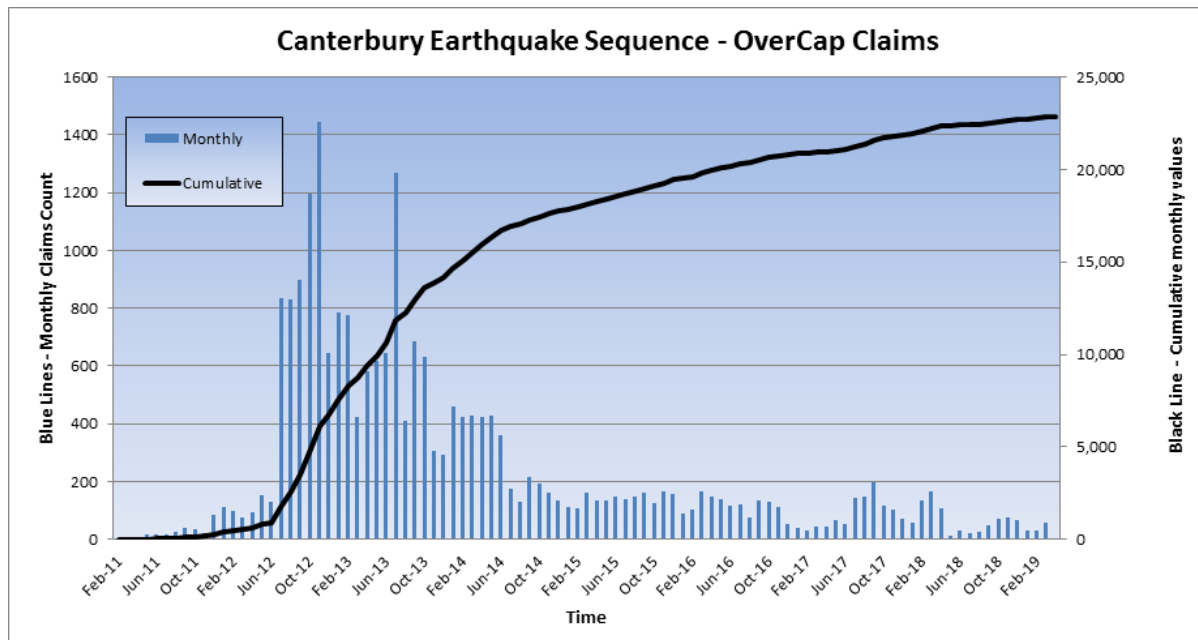
Identification of over-cap claims

- 130 **Figure 1** below provides a high level illustration of when EQC identified a property as over-cap from September 2010 until 3 April 2019. In total, as at 3 April 2019 there are approximately 28,900 over-cap properties.⁹¹
- 131 The bulk of over-cap claims were identified by the end of 2014. However, there have been a number of over-cap claims identified since. EQC worked with private insurers to implement a number of initiatives to identify and notify private insurers of over-cap claims as quickly as possible.

⁹¹ The over-caps in the chart have been identified as confirmed over-caps by the presence of a corresponding file note or activity in ClaimCentre version 4, or by a field in a master spreadsheet used by EQC settlement teams and the date this information was entered into the system, or when the apportionment was approved (if earlier). For some properties, no confirmed date could be obtained from the above sources. For this reason, they have been excluded from the chart and make up the balance of the total of 28,900 over-cap properties. In most cases, these are Red Zone properties that were bulk-settled with Canterbury Earthquake Recovery Authority.

There has never been a single 'over-cap' flag in ClaimCenter version 4 or ClaimCenter version 8. Reporting of over-cap numbers is reliant on algorithmic approaches based on other fields. The numbers provided are dependent on EQC's business processes having been correctly followed. At several times in 2012-2013, EQC undertook data quality improvement exercises which led to properties being flagged as over-cap. In these cases, the date recorded in the system, and used in the above chart as being confirmed as over-cap may be several months later than the date when the property was actually confirmed as such. The differences in this graph to the graph provided at page 10 of EQC's Insurance Liability Valuation (ILVR) dated 25 March 2019 is largely due to a different methodology used for identifying over-cap dates. The ILVR chart is based on payment dates.

Figure 1 - Canterbury Earthquake Sequence – Over Cap Claims



Value stream mapping

132 In or around 2012, EQC conducted what it termed Value Stream Mapping so that it could understand the status of all claims and identify:

- a The number of claims resolved by exposure type (building, land or contents) and by property;
- b Where in EQC’s claims process each claim was at and to form a view why a claim wasn’t progressing; and
- c The key constraints to settlement, where the ‘bottlenecks’ were and issues that required escalation.

133 The mapping work was fundamental to EQC being able to provide improved reporting on the status of its claims resolution. The mapping also enabled EQC to set some preliminary completion targets and led to a reprioritisation of efforts and better resource planning. It was regarded as the best claims data available at that time. EQC shared this data with private insurers⁹² to assist the private insurers in understanding the volume of claims that had the potential to exceed cap and where these claims were in EQC’s claims process.⁹³

⁹² It was also shared with other interested parties such as the Minister and Community Advocacy Group.

⁹³ See an example of the Value Stream Mapping; Canterbury Dwelling Settlement, claim categories greater 80K excluding Red Zone properties, snapshot date 30 November 2012.

ClaimCenter notification

- 134 ClaimCenter had an automatic flag which was sent to a designated contact person at the relevant private insurer, putting the private insurer on notice that the amount of a customer's claim (building or contents) had reached 75% of cap.⁹⁴

Information on claims near or over-cap

- 135 In approximately April 2012, EQC sent private insurers information on claims that were near cap⁹⁵ or over-cap weekly by email until approximately mid-2014. Private insurers also received information about individual properties from EQC's settlement teams. From mid-2014, these processes were reconciled and a weekly list was provided to EQC's settlement teams, who notified private insurers. In April 2015 EQC provided private insurers with cap status updates on all of their properties. From mid-2017, this changed to a monthly status update on all properties with an open issue to resolve.

Over-cap fast track process

- 136 EQC put in place the 'over cap fast track' process which involved EQC and private insurers (starting with two major private insurers, IAG New Zealand Limited and Southern Response Earthquake Services) identifying properties awaiting repair through the Canterbury Home Repair Programme where the earthquake damage had the potential to exceed cap for an event.
- 137 EQC expedited its usual processes by passing the customer on to their private insurer before EQC finalised its settlement position.⁹⁶ EQC paid the customer (or the customer's mortgagee where applicable) an interim payment of the applicable cap amount for the 22 February 2011 event.⁹⁷ In cases where EQC had an actual assessment of damage for an event (for example EQC assessed the property after the 4 September 2010 event and before the 22 February 2011 event occurred) EQC also allocated an amount based upon that scope for the September event.

Value Stream Mapping (VSM) was replaced in approximately 2016 by Canterbury Open Building Issues (COBI) reporting. VSM and COBI reporting were delivered via Sharepoint and Excel, until April 2018 when EQC migrated claims data from ClaimCenter version 4 to ClaimCenter version 8. Since then, reporting on ClaimCenter version 8 has been provided through an application called QlikSense

⁹⁴ The notification may have lost its effectiveness over time, due to a number of reasons, such as multiple claims, and damage needing to be apportioned across events.

⁹⁵ Near cap was defined as instances where the apportioned cost for a claim exceeded \$83,000, or where the total apportioned cost for the property exceeded \$100,000.

⁹⁶ <https://www.eqc.govt.nz/news/eqc-streamlines-approach-to-over-cap-claims-with-insurer-support>

⁹⁷ Operational Instruction dated 19 May 2016.

138 The private insurer agreed to take full responsibility to manage the customer’s claim(s). The private insurer would then provide EQC with its assessment of the cost to reinstate the earthquake damage. EQC would use this information to apportion the earthquake damage and determine its final settlement position.⁹⁸ Approximately, 97 customers were handed to their private insurer through this process.

Joint accelerated review team

139 From 2016 onwards, there was a significant increase in the number of claims being reopened arising from customer complaints about first time repairs.⁹⁹ To set the scene, by the end of 2015, the majority of first time repairs through the Canterbury Home Repair Programme were completed. EQC and the Canterbury Home Repair Programme focus turned to remedial requests arising from repairs.¹⁰⁰ Fletcher EQR also commenced carrying out an audit of repairs carried out as part of the Canterbury Home Repair Programme which involved ‘jack and pack’ repairs, and where floor re-levelling was required across the entire house and required engineering or other specialist technical input.¹⁰¹

140 In September 2016, EQC and the Insurance Council of New Zealand agreed to terms of reference for the establishment of a joint accelerated review team (often referred to as JART).¹⁰² The terms of reference arose out of a meeting between Insurance Council of New Zealand members involved in the Canterbury Earthquake recovery (IAG New Zealand Limited, Tower, Southern Response, Vero, EQC and representatives of central Government, including the Minister) in August 2016. The initiative was established to improve the speed at which over cap claims were identified by EQC and passed to the private insurers. The terms of reference record that the joint accelerated review team would:

- a review existing unresolved customer claim files and identify potential over-cap claims; and
- b make recommendations to EQC on individual claims that could be handed over to the private insurer for resolution.

⁹⁸ See Executive Leadership Team paper titled ‘*Dwellings with over-cap exposures – update*’, dated 4 October 2016 which records that at October 2016 just under 300 properties were jointly reviewed – over 100 reached cap during the review, and 90 properties (in addition to those confirmed as having reached cap) were handed over under the interim payment process.

⁹⁹ See Briefing to the Public Inquiry into the Earthquake Commission, *Canterbury Home Repair Programme* dated 24 June 2019, specifically paras 188-189.

¹⁰⁰ In mid-2014, EQC had also established a “remediation hub” to carry out remedial repairs. See Earthquake Commission, *Post CHRP Repair Issues ELT Update*, dated 19 November 2015, page 2.

¹⁰¹ <https://www.eqc.govt.nz/news/eqc-will-put-right-non-compliant-repairs>

¹⁰² See Joint Accelerated Review Team Terms of Reference dated 15 September 2016.

- 141 The Chief Executive’s Report to EQC’s Board in September 2016 reported the collaboration between EQC and private insurers was aimed at delivering more certainty for customers in as short a time as possible. This was to be achieved by ‘removing duplication of processes and improved daily communication between the parties, thereby eliminating delays in settlement. Under the initiative, processes that have previously run in a linear way will now be run in parallel.’¹⁰³
- 142 In October 2016, EQC provided information on around 3,300 claims to the joint accelerated review team.¹⁰⁴
- 143 As part of the joint accelerated review team initiative, EQC gave private insurers access to its claims management system for the purpose of claims within the review team’s scope.¹⁰⁵
- 144 While the terms of reference refer to the initiative operating until December 2016, private insurer access continued throughout 2017 until mid-2018 when EQC upgraded its claims management system.
- 145 EQC continues to provide representatives of private insurers with access to ClaimCenter to identify the status of claims open within EQC’s system. In particular, whether the claims are under-cap or have the potential to go over-cap (see paragraphs 163 - 174 below)¹⁰⁶ While this access is available, information on potential over cap claims is more often obtained by direct correspondence between EQC and the private insurers at an operational level. Privacy concerns in relation to providing private insurers access to EQC claim information in cases where claims are under cap (see paragraph 63 above) is now addressed by section 31A of the Earthquake Amendment Act 2019.¹⁰⁷

¹⁰³ See page 4 of the Chief Executives report to the EQC Board dated 26 September 2016.

¹⁰⁴ See Executive Leadership Team paper titled ‘*Dwellings with over-cap exposures – update*’, dated 4 October 2016, minutes of Executive Leadership Team meeting dated 10 October 2016 and the Chief Executive’s Report to the EQC Board dated 18 October 2016.

¹⁰⁵ EQC considers the claims management system access it provides to private insurers is for the purpose of resolving the claim by a customer shared by EQC and the private insurer and therefore accords with the information privacy principles (IPP) (particularly IPP 10 and IPP 11).

¹⁰⁶ Which summarise the current initiatives in place to facilitate engagement with the private insurers.

¹⁰⁷ Clause 1 of Schedule 1AA of the Earthquake Commission Act now states that: “*Information collected by the Commission before section 5 of the Earthquake Commission Amendment Act 2019 comes into force is taken to have been collected for all of the purposes referred to in section 31A(1) and (2)*”. Section 5 of the 2019 Amendment Act came into force on 19 February 2019.

EQC's participation in over cap claims handling

- 146 EQC implemented a new over cap notification process with private insurers for claims that were re-opened and a further settlement payment or further repair resulted in the claim exceeding cap for an event.¹⁰⁸ The process involved:
- a Identification – early identification of over cap claims tailored to the remedial work streams it was being managed by Fletcher EQR, EQC's in house repair team or customer resolution;¹⁰⁹
 - b Confirmation – to confirm an over-cap claim on the basis of the information that EQC had currently available;¹¹⁰ and
 - c Insurer resolution – EQC engages with the private insurer and settles the customer's claim in accordance with the Earthquake Commission Act.¹¹¹
- 147 Insurer resolution involved EQC sending the private insurer all the relevant information on the customer's claim (reports, scopes of works, costing, and any costs that no longer contribute towards cap). The private insurer either accepted, requested further information, or discussed any issues with EQC through a joint review. EQC started to implement a more pragmatic approach to the provision of customer information to the private insurers as part of this process.

Disregarded costs

- 148 Private insurers had two key concerns in relation to re-opened claims where subsequent settlements were made by EQC:
- a they wanted to ensure that they did not have to pay more than what they would have paid had EQC repaired or cash settled the customer's property to the standard required by the Earthquake Commission Act the first time; and
 - b the number of properties which EQC had previously repaired through the Canterbury Home Repair Programme on the basis that they had been determined as being under cap, now being identified by EQC as being over cap.¹¹²

¹⁰⁸ See Executive Leadership Team paper titled '*Dwellings with over-cap exposures – update*', dated 4 October 2016.

¹⁰⁹ See EPOCH identification phase process for Customer Resolution Team, EPOCH identification phase process for the in-house repair team, EPOCH identification phase process for Fletcher EQR.

¹¹⁰ See EPOCH Confirmation phase process.

¹¹¹ See EPOCH Resolution phase process.

¹¹² See Executive Leadership Team paper titled '*Dwellings with over-cap exposures – update*', dated 4 October 2016.

- 149 EQC developed a process to calculate which first time settlement costs should contribute towards EQC’s cap calculation and which costs should be disregarded (treated as not contributing towards EQC’s cap calculation). This process was recorded in an operational instruction titled “Reviewing what costs contribute towards cap calculation” in April 2017.¹¹³ This process is known as EQC’s disregarded costs process.
- 150 In respect of first time settlements by repair through the Canterbury Home Repair Programme, remedial requests¹¹⁴ could include:
- a Missed scope – damage not included in the original scope of works, where it was later found that it should have been included;
 - b Scope not completed – damage included in the original scope of works, but not repaired;
 - c New damage – damage from earthquakes after repairs were completed;
 - d Incorrect and/or failed repair strategies – failure of building materials and/or where rework was required because the original repair strategy failed or was incorrect; and
 - e Work quality – repair work that was not of acceptable quality.
- 151 EQC’s disregarded costs process provides guidance on how to treat cases where EQC agreed with the customer’s remedial request that an additional settlement is required. In summary, it explains that EQC should not count towards the EQC cap, the cost of work that was done in the first time repair through the Canterbury Home Repair Programme that needs to be redone due to work quality, building product failure, work included in the scope but not completed and/or incorrect repair strategy. EQC also should not count the cost of otherwise good quality work that was done in the first time repair that now needs to be redone in order to repair missed damage that was not repaired and/or to implement a revised repair strategy.
- 152 For example, if the total cost of the first time repair was \$70,000 and the total cost of completing the remedial work to the required standard is \$80,000. However, there is \$50,000 of work which needs to be re-done due to work quality and \$10,000 of work which has to be redone as a result of a revised repair strategy. When calculating the EQC cap, the equation would be $(\$70,000 + \$80,000) - (\$50,000 + \$10,000) = \$90,000$. This amount is less than the cap of \$100,000 (even though the total expended by EQC is more than the EQC cap).

¹¹³ EQC shared the development of the operational instruction through the Joint Accelerated Review Team for private insurers to provide feedback.

¹¹⁴ See Briefing to the Public Inquiry into the Earthquake Commission, *Canterbury Home Repair Programme* dated 24 June 2019 at paragraph 193.

- 153 In cases where EQC determined that there was missed earthquake damage and/or a failed or incorrect repair strategy, the cost to carry out the required further works often exceeded EQC's cap for an event (even after EQC had completed its disregarded costs process). In such cases, EQC generally cash settled the customer up to the applicable cap per event and directed the customer to their private insurer to obtain any over cap portion that the private insurer was liable for under its policy.¹¹⁵
- 154 Difficulties arose between EQC and the private insurers where there was a difference in technical opinion about:
- a Whether there were any workmanship issues arising from the work carried out in the Canterbury Home Repair Programme or later through EQC's in house repair programme;
 - b Whether any previous repair work would now need to be redone in order to repair the missed earthquake damage and/or carry out a revised repair strategy; and
 - c Whether any repair work carried out through the Canterbury Home Repair Programme or EQC's in-house repair programme would remain unaffected by any revised repair strategies.
- 155 Calculation of the EQC cap and EQC's disregarded costs process was also relevant to re-opened claims where the customer had been cash settled by EQC and that cash settlement had been used to carry out the repair works. Any issues of workmanship had to be raised by the customer directly with the contractor engaged by them to carry out the work rather than EQC. However, cases where the cash settlement was based on an incorrect repair strategy could require EQC to reconsider its settlement and re-calculate the costs which contribute to cap. In some cases, this could result in the claim being over cap for an event. Where this occurred, EQC and the private insurers would engage regarding EQC's calculation of disregarded costs.
- 156 EQC and private insurers have had to engage in often complex and time consuming debates to reach agreement on the extent of any disregarded costs and the nature and cost of any further repair works required.

On-sold properties

- 157 An "on-sold property" is a property that has been sold by the original owner (that is, the owner at the time of the Canterbury earthquake sequence) to another owner (and potentially a number of subsequent owners).

- 158 There are several issues that may arise from on-sold properties, as follows:
- a an EQC managed repair may have been carried out that has “failed” or is “not up to standard”;
 - b additional earthquake damage may have been identified that requires a change to the original repair strategy. In some cases some of the earthquake damage may have been missed by the previous owner and/or during the assessments that EQC performed;
 - c if and when it is determined the further work is earthquake-related, then the cap can become important. Specifically:
 - i if the property is under cap, then EQC will re-open the claim and conduct the re-repair or settle with a cash payment; but
 - ii if the new work pushes the property over cap, then EQC transfers the claim to the private insurer and EQC is liable up to the cap;
 - d depending on the private insurer in question and whether the claim has been assigned over to the new owner, a purchaser may not have the same entitlements to the private insurer’s insurance as the original owner, or any entitlement at all above EQC’s cap, or any entitlement at all.
- 159 Settling on-sold properties previously repaired under the Canterbury Home Repair Programme where the outstanding work to resolve the claim took the claim over-cap has in some cases resulted in, for example:
- a the purchaser of the property finding that there is a shortfall between the settlement from EQC and the total cost to repair their property which is not met in full by the private insurer.¹¹⁶ Purchasers in this situation have sought to recover the shortfall from EQC. The issue of whether EQC must pay any sums above the EQC cap to such purchasers is an issue raised in a number of proceedings filed against EQC;^{117 118}

¹¹⁶ The extent of the liability of the private insurer at the time of the earthquake event to a subsequent purchaser with assignment of the private insurance claim was considered by the High Court in July 2017. The High Court released its decision, *Xu & Diamantia Trust v IAG and EQC* [2017] NZHC 1964, in August 2017. The decision confirms that the reinstatement benefit in a private insurance policy is personal to the insured at the time of the earthquake event and cannot be passed on to subsequent purchasers. The decision was appealed to the Court of Appeal (*Xu v IAG New Zealand Limited* [2018] NZCA 149) and the Supreme Court (*Xu v IAG New Zealand Limited (SC 47/2018)* [2019] NZ SC 68). The Supreme Court has recently dismissed the appeal.

¹¹⁷ The issue is scheduled to be considered by the High Court in August 2019. See paragraphs 54 – 81 of the Department of Prime Minister and Cabinet’s *‘Inquiry in EQC – Proactive Release January 2019’* for further analysis of these issues (<https://dpmc.govt.nz/sites/default/files/2019-01/cabinet-paper-canterbury-insurance-next-steps-dev-18-sub-0150.pdf>)

¹¹⁸ External communications on this issue include: <https://www.eqc.govt.nz/news/eqc-seeks-clarity-on-on-sold-overcap-issue>; <https://www.stuff.co.nz/national/103190480/hundreds-of-onsold-earthquakedamaged-homes-needing-rerepairs-recorded-in-christchurch>; <https://www.radionz.co.nz/national/programmes/checkpoint/audio/2018651531/eqc-on-sold-homeowners-trapped-in-broken-homes>;

- b the private insurer and/or the purchaser arguing that EQC elected to repair the property the first time and must therefore continue to complete the repair. This argument is raised in a number of proceedings filed against EQC and at the time of writing remains untested by the New Zealand Courts.

Finalisation of liabilities for Canterbury claims as between EQC and the private insurers (insurer finalisation)

- 160 EQC and several private insurers are in negotiations to determine financial liabilities (as between EQC and each insurer) for Canterbury claims. This process is sometimes referred to as “insurer finalisation” and is an ongoing area of work which is expected to take two to three years to complete.
- 161 In respect of over cap claims, some private insurers argued that, for a range of reasons, they were entitled to payments from EQC. For example, disputes between EQC and private insurers regarding protocol 1; costs attributable to EQC for remedial repairs; and costs attributable where a review of the multiple claim payments leads to an apportionment adjustment. Conversely, EQC also considered that it was entitled to reimbursement from private insurers in relation to some claims.
- 162 In some cases, the focus by both EQC and the private insurer to settle their (mutual) customer’s claim, meant that they had deferred issues about the respective liability as between themselves (EQC and private insurer) for the cost of the claim.

Current initiatives

- 163 A number of key initiatives are underway to further develop the relationship between EQC and private insurers, and to accelerate final resolution of Canterbury claims.

SOUTHERN RESPONSE MEMORANDUM OF UNDERSTANDING

- 164 In May 2017, EQC and Southern Response entered into a Memorandum of Understanding under which they agreed to share resources to resolve the (approximately 2,500) residential building claims that related to properties insured by Southern Response. A fundamental principle of the Memorandum of Understanding was to avoid duplication between EQC and Southern Response and to ensure a customer only had to liaise with either Southern Response or EQC.

<https://www.radionz.co.nz/national/programmes/checkpoint/audio/2018641440/on-sold-nightmare-eqc-offers-dollar48-000-despite-dollar260-000-repair-bill>; <https://www.insurancebusinessmag.com/nz/news/breaking-news/eqc-onsold-overcap-claim-liability-to-be-determined-in-court-115959.aspx>; <https://www.stuff.co.nz/the-press/news/108503097/test-case-for-onsold-homes-with-botched-repairs-still-nine-months-away>; <https://www.radionz.co.nz/national/programmes/checkpoint/audio/2018661916/on-sold-broken-home-forces-owner-to-look-for-help-on-facebook>

- 165 On 14 November 2017, the Memorandum of Understanding was extended to 31 December 2018.¹¹⁹
- 166 The Memorandum of Understanding was varied on 31 January 2019.¹²⁰ The variation made the term of the Memorandum of Understanding open-ended (continuing until EQC or Southern Response gave notice of termination) and enabled any EQC claims to be allocated to Southern Response rather than only those claims identified as likely to go over-cap.
- 167 Representatives of EQC and Southern Response meet fortnightly to discuss ways to ensure the effective implementation of the Memorandum of Understanding.

THE STEVENSON REPORT

- 168 In April 2018, Christine Stevenson, Independent Ministerial Advisor completed the 'Report of the Independent Ministerial Advisor to the Minister Responsible for EQC'. The Stevenson Report made three recommendations which related to EQC's relationship with private insurers:
- a senior management should schedule regular, formal meetings with each private insurer to remove any barriers to resolving claims;
 - b share information about all claims with the relevant private insurer with the aim of settling claims more quickly (which overlapped with section 31A of the Earthquake Commission Amendment Bill that was before the Select Committee at the time the Stevenson Report was prepared and received royal assent on 18 February 2019);¹²¹ and
 - c work with private insurers to extend the existing Protocol one to allow EQC to make cash settlements above EQC cap, which would then be recovered from the private insurers.¹²²

¹¹⁹ See Letter to Sid Miller, EQC, from Anthony Honeybone, Southern Response Chief Executive Officer, dated 14 November 2017.

¹²⁰ See Variation to Memorandum of Understanding relating to management of outstanding Canterbury earthquake claims.

¹²¹ Section 31A, Earthquake Commission Act (which section came into force on 19 February 2019) enables EQC to share information with private insurers for the purpose of settling claims by customers and for other purposes set out in that section. The scope of section 31A is broad. In particular, section 31A(1)(c) which provides that EQC may collect information for (among other purposes) administering the Earthquake Commission Act and facilitating natural disaster preparedness, response, or recovery (including settlement of insurance claims by insurance companies).

¹²² See Briefing to the Public Inquiry into the Earthquake Commission 'External reviews of EQC since 2010' dated 4 March 2019 at paragraph 47, and Christine Stevenson, Independent Ministerial Advisor 'Report of the Independent Ministerial Advisor to the Minister Responsible for EQC' (April 2018) (report#41)

<https://www.beehive.govt.nz/sites/default/files/2018-06/Report%20of%20the%20Independent%20Ministerial%20Advisor%20to%20the%20Minister.pdf>

169 In KPMG’s November 2018 review of the actions taken by EQC to address the three recommendations in the Stevenson Report¹²³ relating to EQC’s relationship with private insurers¹²⁴, KPMG reported that:

- a Regular bilateral meetings are held with private insurers at a senior level and that strategy and coordination for communication with private insurers is provided by an internal governance group.
- b A number of structural changes have been made to operationally support the interactions with private insurers.
- c In addition to section 31A of Earthquake Commission Bill, EQC continues to share claim information with private insurers for the purposes of settling a customer’s claim. This included EQC providing private insurers with EQC laptops to enable private insurers to access claim data held on EQC’s claims management system. Confidentiality agreements were signed between EQC and each of the private insurers. These access arrangements are still in place.
- d EQC has worked with Treasury on documentation to extend the existing Protocol one to allow cash settlements above EQC cap.

REGULAR BILATERAL MEETINGS WITH PRIVATE INSURERS COORDINATED THROUGH AND INTERNAL GOVERNANCE GROUP

170 EQC’s managers meet regularly with their private insurer counterparts. Generally these discussions focus on the reporting of open EQC claims and forecasting of future re-opened claims which are or have the potential to be over-cap and ways in which to make the reporting and handover of over cap claims more efficient.

171 Discussions regarding a particular claim are managed by EQC’s operational staff such as settlement specialists and technical advisors in accordance with structural changes EQC has implemented.

¹²³ KPMG – ‘Earthquake Commission – Tracking of Recommendations Raised in the Independent Ministerial Advisor’s Report’ (November 2018)(report #43).

¹²⁴ Further consideration of the actions taken by EQC in response to the Stevenson Report are outlined in the Department of Prime Minister and Cabinet’s ‘*Inquiry into EQC – proactive release January 2019*’



OPERATIONAL CHANGES TO SUPPORT INTERACTION WITH PRIVATE INSURERS

- 172 Operational changes to support EQC's interaction with private insurers are focused on developing relationships with the private insurers and the identification of all remaining claims likely to go over-cap as early as possible. EQC's structural changes include:
- a Providing regular reports¹²⁵ to each of the private insurers listing all open claims (over cap and under cap) where that private insurer held the policy of fire insurance at the time of the Canterbury earthquakes;
 - b Creating teams of EQC staff who are responsible for all engagement with a particular private insurer regarding open claims.¹²⁶ Private insurers can then work alongside the relevant EQC team to discuss and agree disregarded costs (if any) and other claim attributes and ultimately agree on ownership of the claim;
 - c Holding regular meetings with each of the private insurers¹²⁷ to discuss particular issues on claims listed in the monthly reports; and
 - d Establishing a dedicated email address for private insurer queries. On receipt of these queries, EQC takes responsibility for determining the appropriate staff member to respond to the query.
- 173 In late 2018, a small number of representatives from Southern Response were given access to EQC's Canterbury office to facilitate a closer relationship when operating under the Memorandum of Understanding.
- 174 Recently, several EQC staff have started working from Southern Response offices piloting a joint approach to resolving remaining Canterbury earthquake claims.

Lessons learned and future thinking on improving EQC and private insurer interface

- 175 EQC has focused on continually learning and improving in this area. Some of the key lessons that it has begun to address are set out below.

EQC's relationship with private insurers

- 176 EQC continues to build close working relationships and provide consistent messaging to private insurers at all levels.

¹²⁵ The regularity of reporting is determined by the particular requirements of each private insurer.

¹²⁶ See current organisation chart which records the settlement teams assigned to each private insurer, including Southern Response under the Memorandum of Understanding and associated variation.

¹²⁷ For some private insurers these meetings occur bi-weekly.

- 177 EQC continues to collaborate with private insurers on how to best respond to events and meet customer expectations including:
- a involving private insurers as much as possible in EQC’s thinking (bring them along the journey) when determining its response to an event.
 - b considering ways it could incentivise the private insurers to continue engagement during periods in which there are no significant natural disaster events. One such way, could be to share relevant research held by EQC with private insurers for their analysis of risk and engagement with them about what new types of research it would be best to commission as part of its research and education function.¹²⁸
- 178 EQC continues to provide regular training to private insurers during periods when there is no event response, on how EQCover works so they are better informed on what EQC covers or does not cover. For example:
- a Manuals of how the Earthquake Commission Act applies (i.e. like the manual provided in the Kaikōura response) so private insurers can refer to and understand EQC’s position in advance of any event (and in the event that they act as an EQC’s agent).¹²⁹
 - b Establishing a common pool of technical resources¹³⁰ who have received training on EQCover and share a commonality in approach to assessment and repair.¹³¹
- 179 Simplifying legislation and removing ambiguity should minimise the potential of future disputes between EQC and private insurers. Alternatively, there needs to be a greater standardisation of terms and conditions between the EQC scheme and private insurer contracts of fire insurance. Many of these issues are being improved by small “tweaks” to the wording and EQC looks forward to working with Treasury on any potential future reform of EQC legislation to promote these improvements.

Improving the system interface between EQC and the private insurers

- 180 System integration needs to be set up as part of a major event preparedness strategy. Alignment of investment into shared systems or technological solutions that can easily interact with each other would greatly improve event responsiveness.

¹²⁸ See Briefing to the Public Inquiry into the Earthquake Commission “Research and Education” dated 10 July 2019.

¹²⁹ EQC is currently drafting new Land and Building manuals. They are designed to be used by EQC, private insurers and other third parties.

¹³⁰ For example, see EQC’s Annual Report 2009-2010 at page 4 https://www.eqc.govt.nz/sites/public_files/eqc-annual-report-2009-10.pdf regarding a scheme designed to increase the number of loss adjusters across New Zealand.

¹³¹ For example, in the Shared Property Pilot the insurers and EQC used a common pool of engineers and loss adjusters. This approach could be strengthened by private insurers working alongside technical and professional bodies such as Engineering New Zealand to invest in research and education of the technical response to various natural disaster damage to land and buildings.

- 181 Sharing of information between EQC and each private insurer needs to include:
- a A shared repository of notified claims that trigger EQCover;
 - b The insurance details of customers that have a contract of fire insurance for a residential building, including detailed information on the residential building, in particular, multi-unit dwellings/shared properties, so verification information is already available when an event occurs.
 - c An agreed set of data that is useful for EQC's research and education and/or for modelling purposes that can be used to benefit both EQC and the private insurers to make better informed decisions when a major event occurs.

Improving EQC's interaction with its customers

- 182 Establishing an EQC/private insurer disputes resolution process in advance of an event would enable speedier resolution of customer concerns. Through the establishment process EQC and private insurers could jointly decide how to resolve any EQC/private insurer liabilities or reimbursement disputes through a finalisation process at the end of an event.

Appendix 1: The scope of cover under the Earthquake Commission Act

- 1 The Long Title of the Earthquake Commission Act provides that the Earthquake Commission Act is to “make provision with respect to the insurance of residential property against damage caused by certain natural disasters”. The Earthquake Commission Act provides insurance for three categories of residential property: “residential buildings”, “residential land” and “personal property”.

The categories of residential property insured under the Earthquake Commission Act

- 2 The Earthquake Commission Act defines “residential building” as follows:¹³²
- residential building** means—
- (a) any building, or part of a building, or other structure (whether or not fixed to land or to another building, part, or structure) in New Zealand which comprises or includes 1 or more dwellings, if the area of the dwelling or dwellings constitutes 50% or more of the total area of the building, part, or structure:
 - (b) any building or part of a building (whether or not fixed to land, or to another building, part, or structure) in New Zealand which provides long-term accommodation for the elderly, if the area of the building which provides long-term accommodation for the elderly constitutes 50% or more of the total area of the building, part, or structure:
 - (c) every building or structure appurtenant to a dwelling referred to in paragraph (a), or a building or part of a building referred to in paragraph (b), and that is used for the purposes of the household of the occupier of the dwelling or for the purposes of the residents of the building or part:
 - (d) all water supply, drainage, sewerage, gas, electrical, and telephone services, and structures appurtenant thereto—
 - (i) serving a dwelling referred to in paragraph (a), or a building or part of a building referred to in paragraph (b), or surrounding land; and
 - (ii) situated within 60 metres, in a horizontal line, of the dwelling or building or part; and
 - (iii) owned by the owner of the dwelling or building or part, or by the owner of the land on which the dwelling or building or part is situated

¹³² Section 2(1) Earthquake Commission Act, definition of “residential building”.

- 3 The Earthquake Commission Act defines “residential land” as follows:¹³³
residential land means, in relation to any residential building, the following property situated within the land holding on which the residential building is lawfully situated:
- (a) the land on which the building is situated; and
 - (b) all land within 8 metres in a horizontal line of the building; and
 - (c) that part of the land holding which—
 - (i) is within 60 metres, in a horizontal line, of the building; and
 - (ii) constitutes the main access way or part of the main access way to the building from the boundary of the land holding or is land supporting such access way or part; and
 - (d) all bridges and culverts situated within any area specified in paragraphs (a) to (c); and
 - (e) all retaining walls and their support systems within 60 metres, in a horizontal line, of the building which are necessary for the support or protection of the building or of any property referred to in any of paragraphs (a) to (c).
- 4 The Earthquake Commission Act defines “personal property” as follows:¹³⁴
personal property means property that is located in or on a residential building; and includes property that is usually so located but is temporarily removed from the building for any reason; but does not include any property used solely or principally for commercial purposes
- 5 Personal property will no longer be covered under the Earthquake Commission Act once part 2 of EQC Amendment Act 2019 has come into force.

The kinds of property not insured under the Earthquake Commission Act

- 6 Schedule 2 of the Earthquake Commission Act identifies property of various kinds that – although they may be captured by the definitions of residential building, residential land and personal property – are not insured under the Earthquake Commission Act.¹³⁵ This includes any motor vehicle; any bush, forest, tree, plant or lawn; any drive or path (other than a form of access constructed in a residential building or an integral part of a residential building); any fence or wall that does not constitute an integral part of a residential building; most swimming pools; and any paving or artificial surface. The items not insured under the Earthquake Commission Act are colloquially referred to as “out of scope” property.
- 7 In practice, a private insurer will provide cover under its policy of insurance for any natural disaster damage to all or some of this out of scope property.

¹³³ Section 2(1) Earthquake Commission Act, definition of “residential land”.

¹³⁴ Section 2(1) Earthquake Commission Act, definition of “personal property”.

¹³⁵ Section 21 and schedule 2 Earthquake Commission Act.

- 8 The application of Schedule 2 to particular factual scenarios has led to regular interaction between EQC and private insurers regarding whether a particular item is covered by EQC or the private insurer.

The risk against which residential property is insured under the Earthquake Commission Act

- 9 Under the Earthquake Commission Act residential buildings, residential land and personal property are insured for “natural disaster damage”. The Earthquake Commission Act defines “natural disaster damage” as follows:¹³⁶

natural disaster damage means, in relation to property,—

(a) any physical loss or damage to the property occurring as the direct result of a natural disaster; or

(b) any physical loss or damage to the property occurring (whether accidentally or not) as a direct result of measures taken under proper authority to avoid the spreading of, or otherwise to mitigate the consequences of, any natural disaster, but does not include any physical loss or damage to the property for which compensation is payable under any other enactment

- 10 The natural disasters that EQC covers are listed in the definition of “natural disaster” included in the Earthquake Commission Act:¹³⁷

natural disaster means—

(a) an earthquake, natural landslip, volcanic eruption, hydrothermal activity, or tsunami; or

(b) natural disaster fire; or

(c) in the case only of residential land, a storm or flood

¹³⁶ Section 2(1) Earthquake Commission Act, definition of “natural disaster damage”. In turn, the words “physical loss or damage” appearing in the definition of “natural disaster damage” are given an extended definition in s 2(1): “**physical loss or damage**, in relation to property, includes any physical loss or damage to the property that (in the opinion of EQC) is imminent as the direct result of a natural disaster which has occurred”.

¹³⁷ Section 2(1) Earthquake Commission Act, definition of “natural disaster”. In turn, “natural disaster fire” is defined in section 2(1) as meaning “fire occasioned by or through or in consequence of an earthquake, natural landslip, volcanic eruption, hydrothermal activity, tsunami, or (in the case only of residential land) a storm or flood”.

- 11 There is therefore cover for residential property insured under the Earthquake Commission Act against any physical loss or damage to the property occurring as the direct result of one or more of the stated natural disasters. However, only residential land is insured under the Earthquake Commission Act against physical loss or damage occurring as the direct result of storm or flood. The rationale for not providing cover under the Earthquake Commission Act for storm or flood damage to residential buildings and personal property appears to have been that there was adequate cover for storm and flood damage from private insurers (who cover residential buildings and personal property but not land).¹³⁸

The circumstances in which the Earthquake Commission Act provides cover for residential property

- 12 With very limited exceptions, residential buildings are automatically insured under the Earthquake Commission Act when a contract for fire insurance has been entered into with a private insurer.¹³⁹ To that end, section 18(1) provides in material part:¹⁴⁰

... where a person enters into a contract of fire insurance with an insurance company in respect of any residential building situated in New Zealand, the residential building shall, while that contract is in force, be deemed to be insured under this Act against natural disaster damage..

- 13 Section 20 contains a similar provision in respect of personal property:¹⁴¹

... where a person enters into a contract of fire insurance with an insurance company in respect of any personal property situated in New Zealand, the property shall, while that contract is in force, be deemed to be insured under this Act against natural disaster damage ...

¹³⁸ See the advice from the Treasury to the Finance and Expenditure Select Committee on EQC Bill dated 16 March 1993 at [5].

¹³⁹ The limited exceptions are: (a) where EQC has previously cancelled the EQC insurance under clause 4 of schedule 3 of the Earthquake Commission Act; and (b) where the insured person has entered into a contract with EQC for direct cover under section 22 of the Earthquake Commission Act.

For the purposes of the Earthquake Commission Act, a renewal of a contract of insurance is deemed to be a new contract (section 2(2) Earthquake Commission Act) and ends when (a) the underlying contract of fire insurance is cancelled, (b) the underlying contract of fire insurance expires on its own terms; or (c) EQC cancels the insurance under the Earthquake Commission Act under clause 4 of schedule 3 of the Earthquake Commission Act.

¹⁴⁰ Section 18(1) Earthquake Commission Act.

¹⁴¹ Section 20 Earthquake Commission Act.

- 14 Section 19 provides cover for residential land. Where the residential building on the land is insured under the Earthquake Commission Act, the associated residential land is also insured under the Earthquake Commission Act.¹⁴² To that end, s 19 provides in material part:¹⁴³

... where a residential building is deemed to be insured under this Act against natural disaster damage, the residential land on which that building is situated shall, while the insurance of the residential building is in force, be deemed to be insured under this Act against natural disaster damage ...

The nature of the cover provided under the Earthquake Commission Act: replacement value cover and indemnity value cover

- 15 Residential buildings, residential land and personal property are insured on different bases under the Earthquake Commission Act.
- 16 Residential buildings are insured under section 18 of the Earthquake Commission Act for their replacement value. In contrast, residential land is insured under section 19 on an indemnity basis.¹⁴⁴
- 17 Personal property is insured under section 20 for its replacement value only if that property is also insured against fire on that basis. If it is insured against fire on any less favourable basis, it is deemed to be insured under the Earthquake Commission Act against natural disaster damage also on that same basis.
- 18 In the context of residential buildings, “replacement value” is defined under the Act as:¹⁴⁵

replacement value means—

(a) in relation to a residential building, any costs which would be reasonably incurred in respect of—

- (i) demolition and removal of debris, to the extent that is essential to enable the building to be replaced or reinstated; and*

¹⁴² The Briefing to the Public Inquiry into the Earthquake Commission, Canterbury Land Programme, dated 24 May 2019 provides further explanation of the residential land cover under the Earthquake Commission Act. See in particular paras 27-31.

¹⁴³ Section 19 Earthquake Commission Act.

¹⁴⁴ This is confirmed in *Earthquake Commission v Insurance Council of New Zealand Inc* [2015] 2 NZLR 381, [2014] NZHC 3138 at [94] and [105] to [114].

¹⁴⁵ Section 2(1) Earthquake Commission Act, definition of “replacement value”, para (a). In relation to any personal property, “replacement value” is defined as meaning the lesser of: (i) the cost of replacing the property with similar property, in a condition equal to but not better or more extensive than its condition when new; and (ii) the cost of reinstating the property to a condition substantially the same as but not better or more extensive than its condition when new: Section 2(1) Earthquake Commission Act, definition of “replacement value”, para (b).

- (ii) *replacing or reinstating the building to a condition substantially the same as but not better or more extensive than its condition when new, modified as necessary to comply with any applicable laws; and*
 - (iii) *complying with any applicable laws in relation to the replacement or reinstatement of the building; and*
 - (iv) *other fees or costs payable in the course of replacing or reinstating the building, including architects' fees, surveyors' fees, and fees payable to local authorities;*
- 19 The replacement value cover provided under the Earthquake Commission Act for any given residential building may differ from the nature of the cover provided for that building under the private insurer's policy:
- a The private insurer's policy may insure the residential building only for its indemnity (or present day) value. By contrast, the Earthquake Commission Act always provides cover for residential buildings on the replacement value basis.
 - b Where the private insurer's policy insures the residential building for its replacement value, it will typically provide cover on a "costs incurred" basis: in other words, the private insurer does not have to pay the cost of repairing or rebuilding the residential building to the replacement value standard until the insured person has incurred those costs.¹⁴⁶ Until those costs are incurred, the insurer is liable to pay only on the indemnity value basis. There is no such "costs incurred" precondition for the replacement value cover that the Earthquake Commission Act provides for residential buildings.
 - c In any given case, the definition of the replacement value standard in a private insurer's policy can differ in some respects from the wording used in the Earthquake Commission Act. Accordingly, although these differences are usually at the margins, the standard to which the private insurer must pay or repair under the policy may differ slightly from the standard to which EQC must pay or repair under the Earthquake Commission Act.

The amount of insurance provided under the Earthquake Commission Act is limited

- 20 For each of residential buildings, residential land and personal property, the amount of insurance is subject to a cap specified in the Earthquake Commission Act. This cap is colloquially referred to as the "cap".

¹⁴⁶ See, for example, the policy in issue in *Ridgecrest NZ Ltd v IAG New Zealand Ltd* [2015] 1 NZLR 30, [2014] NZSC 117.

The amount of EQC replacement cover for residential buildings

- 21 The default cap under the Earthquake Commission Act for each “dwelling” within a residential building is \$100,000.¹⁴⁷ For example, where there is one standalone house on a property, which is a common situation, the limit is \$100,000. Where there is one standalone house and a separate, self-contained unit which also constitutes a dwelling, the cap increases to \$200,000.¹⁴⁸ There is no limit on the number of dwellings that may make up a residential building but the number of dwellings within the residential building must have been disclosed to the private insurer at the time the contract of fire insurance is entered into for the cap to be increased to reflect the number of dwellings.
- 22 There are two situations in which the insured person and the private insurer may agree on a lower amount of cover under the Earthquake Commission Act for the residential building than the default amount under section 18(c):
- a If the contract of fire insurance specifies a replacement sum insured that is lower than the default amount under section 18(c), this lower amount represents the limit of cover provided under the Earthquake Commission Act.¹⁴⁹
 - b If the contract of fire insurance does not specify a replacement sum insured, but it does specify an amount to which the residential building is insured under the Earthquake Commission Act that is lower than the default amount under section 18(1)(c), this lower amount represents the limit of cover provided under the Earthquake Commission Act.¹⁵⁰ In this situation, the amount must not be less than \$1,000 (or any higher sum fixed from time to time by regulation) per square metre of the residential building.¹⁵¹ For example, for a 80 m² residential building consisting of a single dwelling, the specified replacement sum insured cannot be less than \$80,000 but may be any amount from \$80,000 to \$100,000 – the default amount under section 18(1)(c).
- 23 Once the Earthquake Commission Amendment Act 2019 has come fully into force, the default amount of insurance available for a residential building under the Earthquake Commission Act will be increased to \$150,000 per notified dwelling within the building (not \$100,000 as previously). In addition, the insured person and the private insurer will not be permitted to specify a lesser EQC sum insured unless that sum is at least \$2,500 (not \$1,000 as previously) per square metre of the residential building.

¹⁴⁷ The term “residential building” and “dwelling” is defined in s2(1). By s 18(3), a residential building is deemed to comprise one dwelling unless the existence of a higher number of dwellings in the building is disclosed to the insurance company at the time that the contract of fire insurance is entered into.

¹⁴⁸ This is on the basis that the existence of more than one dwelling has been disclosed to the private insurer at the time the contract of fire insurance was entered into.

¹⁴⁹ Section 18(1)(a) Earthquake Commission Act.

¹⁵⁰ Section 18(1)(b) Earthquake Commission Act.

¹⁵¹ Section 18(2) Earthquake Commission Act. If the contract specifies an amount to which the building is to be insured under the Earthquake Commission Act that is less than the permitted minimum, the contract is to be treated as having specified the permitted minimum: section 18(2).

The amount of EQC indemnity cover for residential land

- 24 The amount of insurance under the Earthquake Commission Act for land is also limited under section 19. In the case of any particular damage, section 19 provides that the amount (excluding GST) to which the residential land is deemed to be insured under the Earthquake Commission Act is the sum of the following two values:
- a the value, at the site of the damage, of the smallest of the following areas of land:
 - i an area of land equal to the minimum area allowable under any operative district plan for land used for the same purpose that the residential land was being used at the time of the damage (in other words, the area of the minimum-sized residential section allowable under any operative district plan); or
 - ii an area of land of 4,000 m²; or
 - iii the area of land that is actually lost or damaged; and
 - b the indemnity value of any insured bridges, culverts and retaining walls that are lost or damaged.
- 25 More information on the EQCover for residential land can be found in *Briefing to the Public Inquiry into EQC: Canterbury Land Programme*.

The amount of EQC insurance for personal property

- 26 The amount of insurance under the Earthquake Commission Act for any “personal property” insured under a single contract of fire insurance is \$20,000. This amount is reduced if the personal property is insured against fire damage for a lesser maximum amount.¹⁵² The \$20,000 limit in section 20 can be fixed at a higher amount by regulation. No such regulations have ever been made.¹⁵³
- 27 Once EQC Amendment Act 2019 has come fully into force, there will be no cover under the Earthquake Commission Act for personal property.

¹⁵² Section 20 Earthquake Commission Act.

¹⁵³ This will occur in July 2019.

The insurance under the Earthquake Commission Act reinstates after each occurrence of natural disaster damage

- 28 The Earthquake Commission Act does not expressly state whether the amount of the insurance under sections 18 or 20 is an aggregate amount available during the period of insurance or whether it is for each occurrence of natural disaster damage during that period. In *Re Earthquake Commission*, the High Court confirmed that the insurance under sections 18 and 20 is a continuing cover and therefore the amount of insurance available under these two sections is for each occurrence of natural disaster damage during the period of insurance.¹⁵⁴ This decision led to EQC apportioning damage to the event in which it occurred – now commonly referred to as ‘apportionment’ (see paragraphs 25 - 32 of main briefing above).¹⁵⁵

Direct cover with EQC

- 29 Section 22 of the Earthquake Commission Act empowers EQC, at its discretion, to enter into a contract of insurance against natural disaster damage directly with an insured person. A contract made under section 22 may be made for the insurance of any residential building, residential land or personal property that is not insured under sections 18 to 20 or in substitution for the insurance of that property under sections 18 to 20.¹⁵⁶ The amount of the insurance under the direct contract may not exceed the amount that would apply if the property were insured under sections 18 to 20.
- 30 In practice, EQC will generally enter into a direct contract of insurance only where an insured person has been unable to obtain EQCover for their residential building or personal property in the usual way (that is, through the purchase of a private insurance policy that includes fire cover). From November 2011, EQC generally declined to enter into any new direct contracts of natural disaster insurance. In August 2017, EQC started to consider applications for direct cover on a case-by-case basis where an insured person would otherwise be unable to obtain natural disaster insurance because of factors not relevant to natural disaster risk.¹⁵⁷ Applications for direct cover are not common.¹⁵⁸

Private insurance cover

- 31 Section 30 recognises that property may be insured both under the Earthquake Commission Act and otherwise than under the Earthquake Commission Act.

¹⁵⁴ *Re Earthquake Commission* [2011] 3 NZLR 695 (HC).

¹⁵⁵ Which provide further detail on EQC’s apportionment process in the context of the Canterbury earthquake sequence.

¹⁵⁶ Section 22(2) Earthquake Commission Act.

¹⁵⁷ For example where the customer has a criminal conviction.

¹⁵⁸ At the time of the Canterbury earthquake sequence, EQC had 19 Customers (109 dwellings and 102 personal property policies) with direct cover. At the time of this Briefing Paper, EQC has 2 customers with direct cover involving 2 properties.

- 32 Section 30(1) sets out a default rule that insurance under the Earthquake Commission Act will only cover loss that has not already been covered by any other insurance.¹⁵⁹¹⁶⁰
- 33 However, this default position is reversed if the associated private insurance cover is in excess of the amount provided under the Earthquake Commission Act.¹⁶¹
- 34 In practice, private insurers invariably provide a greater level of insurance for residential buildings (and personal property) than the applicable cap under the Earthquake Commission Act.¹⁶²
- 35 Private insurers routinely provide cover against natural disaster damage to residential buildings and personal property over and above the insurance provided under the Earthquake Commission Act. Subject to one exception mentioned below, private insurers do not provide cover against natural disaster damage to residential land. Accordingly, and subject to this exception, EQC alone administers the insurance against natural disaster damage for this category of residential property.¹⁶³
- 36 The exception concerns bridges, culverts and retaining walls, which may be covered as residential land under the Earthquake Commission Act.¹⁶⁴ Private insurers often provide cover against natural disaster damage to bridges, culverts and retaining walls over and above the insurance provided under the Earthquake Commission Act. For these items, the interaction between EQC insurance and private insurance regarding the extent of EQCover and the private insurance cover over and above the EQCover is the same as for “residential buildings”.

¹⁵⁹ Section 30(1) provides: Where on the occurrence of any property of natural disaster damage against which it is insured under any of sections 18 to 20, or section 22, the property is also insured against that damage under any contract or contracts made otherwise than under this Act, the insurance of the property under this Act (to the amount to which it is so insured) shall be deemed to be in respect of so much of that natural disaster damage as exceeds the sum of—

(a) the total amount payable under that contract or those contracts in respect of that natural disaster damage; and
(b) the proportion of the natural disaster damage to be borne by the insured person under the conditions applying to the insurance of the property under this Act.

¹⁶⁰ The Supreme Court considered s 30 of the Earthquake Commission Act in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2015] 1 NZLR 432, [2014] NZSC 147.

¹⁶¹ Section 30(2) provides: Subsection (1) shall not apply with respect to any contract of insurance made otherwise than under this Act to the extent that the contract provides for cover in excess of the amount to which cover is provided under this Act.

¹⁶² This is often referred to by private insurers as ‘top up cover’.

¹⁶³ Note however that there are issues concerning the interaction of the land and building insurance which are the subject of dispute and on-going litigation between EQC and private insurers (who provide building insurance but not land insurance). See the Briefing to the Public Inquiry into the Earthquake Commission, *Canterbury Land Programme*, dated 24 May 2019 for further detail.

¹⁶⁴ Section 2(1)(d) and (e).