



**IN CONFIDENCE**

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# **Briefing to the Public Inquiry into the Earthquake Commission**

Title	Ministerial Directions since 1 January 1994
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## Ministerial Directions since 1 January 1994

### Purpose

- 1 The purpose of this paper is to set out a high level description of 18 Ministerial directions<sup>1</sup> to the Earthquake Commission (EQC) made by various Ministers for the period 1 January 1994<sup>2</sup> to date (Directions). The paper touches on:
  - a the legal basis for the Directions;
  - b the categories of the Directions; and
  - c possible ideas for further exploration regarding the making of Ministerial directions.
- 2 The 18 Directions are each described in the **Appendix** to this paper.

### Consultation

- 3 EQC has consulted with The Treasury in the preparation of this paper.

### Ministerial Directions – Legal Basis

- 4 When it was enacted, the Earthquake Commission Act 1993 (EQC Act) contained a power for the Minister<sup>3</sup> to give directions to EQC.<sup>4</sup> In 2005, that power was amended to encompass the new provisions related to Ministerial directions in the Crown Entities Act 2004.

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<sup>1</sup> To the best of our knowledge, there were only 18 Ministerial directions made during this period. However, we have not conducted a manual search of all relevant files or all copies of the *Gazette* that relate to this period.

The 18 Ministerial directions are directions under the EQC Act and/or Part 3 of the Crown Entities Act 2004, but do not include “whole of government” directions that apply to EQC as well as a range of other Crown entities.

<sup>2</sup> The Earthquake Commission Act 1993 came into force on 1 January 1994.

<sup>3</sup> The “Minister” is defined in the EQC Act to mean the Minister of Finance. In practice in more recent years the Ministerial functions have been conferred on the Minister for Canterbury Earthquake Recovery and (currently) the Minister Responsible for the Earthquake Commission.

<sup>4</sup> Under the historical version of section 12(1), EQC Act (27 March 1998 to 24 January 2005), the Minister could, after consulting, give EQC in writing such directions as the Minister thought fit as to the policy to be followed by EQC in the exercise of its functions or powers. Also, under the historical version of section 5(1)(f)(ii), EQC Act (1 January 1994 to 24 January 2005), the Minister could, by written notice to, and after consultation with, EQC, confer additional functions on EQC. The Notices were the equivalent of Ministerial directions (under current law) to EQC to perform additional functions – and they are being treated as Ministerial directions for the purposes of this paper.

- 5 Under the Crown Entities Act, EQC is a Crown agent. As such, the Minister can direct EQC to give effect to government policy related to EQC’s functions and objectives.<sup>5</sup>
- 6 The Minister can also direct EQC to carry out additional functions.<sup>6</sup>
- 7 Certain constraints apply under the Crown Entities Act regarding the giving of a Ministerial direction to EQC. In particular, the Minister:
  - a must consult with EQC before giving the direction;<sup>7</sup>
  - b must present a copy of the direction to the House of Representatives and publish it in the *Gazette*;<sup>8</sup> and
  - c cannot direct EQC to do something, or bring about a particular result, in respect of a particular person or persons.<sup>9</sup>
- 8 EQC must, in turn, in performing its functions, give effect to a written direction signed by the Minister.<sup>10</sup>

### *“Whole of government” directions*

- 9 EQC is also subject to a number of directions made by the Minister of State Services and the Minister of Finance to support a “whole of government” approach.<sup>11</sup> These directions typically apply to a range of Crown entities (including EQC) and cover “whole of government” policies (for example, functional leadership requirements for ICT, property and procurement). These “whole of government” directions are not the focus of this paper and are not included in the list of 18 Directions described in the **Appendix**. We can provide you with further information about the “whole of government” directions, if you wish.

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<sup>5</sup> See section 103, Crown Entities Act; section 12(1), EQC Act.

<sup>6</sup> See section 5(1)(f)(ii), EQC Act; section 112, Crown Entities Act.

<sup>7</sup> See section 115(1), Crown Entities Act.

<sup>8</sup> See section 115(2), Crown Entities Act.

<sup>9</sup> See section 113(1)(b), Crown Entities Act.

<sup>10</sup> See section 114, Crown Entities Act.

<sup>11</sup> See section 107, Crown Entities Act. See also sections 108 to 111, Crown Entities Act for the processes and requirements governing “whole of government” directions.

## Categories of Directions given to EQC

- 10 The 18 Directions made since 1 January 1994 broadly fall into the following categories:
- a Directions that introduce new functions outside the core business of EQC;
  - b Directions that introduce new functions that extend (or “fill the gaps”) of EQC’s existing functions; and
  - c Directions regarding EQC’s investment of the Natural Disaster Fund (the Fund).

### *Category 1 – Directions that introduce new functions outside the core business of EQC*

- 11 In several instances since 1 January 1994, EQC has been directed to perform additional functions outside its remit to perform its existing legislative functions.<sup>12</sup> Examples are the Directions that relate to:
- a the homes damaged or endangered by the collapse of the goldmine in Waihi on 13 December 2001;
  - b the proposed additional land remediation in the aftermath of the Canterbury earthquakes;
  - c the inspections of, and emergency works to repair, damage to dangerous or insecure residential premises (insured and uninsured) in the aftermath of the 22 February 2011 Canterbury earthquake;
  - d the reinstatement of the land in the Edgecumbe community (insured and uninsured; residential and non-residential) that was damaged as a result of storms and floods occurring in April 2017.
- 12 The background and circumstances of these Directions are outlined briefly below.

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<sup>12</sup> For EQC’s functions, see section 5, EQC Act.

NOTICES REGARDING DAMAGED OR ENDANGERED HOMES – DECEMBER 2001 WAIHI GOLDMINE COLLAPSE

- 13 Twice in 2002, the Minister conferred on EQC functions in relation to the collapse of the goldmine in Waihi on 13 December 2001.<sup>13</sup> The functions included investigating and assessing 12 damaged or endangered homes, providing advice on the amount of ex gratia payments, organising valuations, and establishing whether any homes could be removed.
- 14 The Waihi goldmine collapse was not a “natural disaster” as defined in the EQC Act.<sup>14</sup> Therefore under the existing provisions of the EQC Act, EQC did not provide insurance cover as a result of the collapse in respect of residential buildings, residential land or contents. However, the damage caused by the Waihi event was similar to the type of damage that EQC would normally expect to respond to.
- 15 In the circumstances, the Minister of Finance reportedly said that “some lateral thinking” had found a way around the problem.<sup>15</sup> His February 2002 Notice to EQC conferred on EQC additional functions, and notably provided that EQC assessments were to be conducted as if the damage or endangerment to the 12 homes was caused by a “natural disaster” as defined in the EQC Act.<sup>16</sup>

DIRECTIONS TO PERFORM ADDITIONAL LAND REMEDIATION – CANTERBURY EARTHQUAKES

- 16 After the 4 September 2010 earthquake, the Crown proposed making provision for up to \$140,000,000 plus GST additional expenditure for additional land remediation works.

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<sup>13</sup> See Notice from Hon Dr Michael Cullen, Minister of Finance to EQC dated 11 February 2002 <https://gazette.govt.nz/notice/id/2002-go1094>; and Notice from Hon Trevor Mallard, Acting Minister of Finance to EQC dated 1 October 2002 <https://gazette.govt.nz/notice/id/2002-go6746>. These Notices were given under the historical version of section 5(1)(f)(ii), EQC Act (1 January 1994 to 24 January 2005). Under this provision, the Minister could, by written notice to, and after consultation with, EQC, confer additional functions on EQC. As such the Notices were the equivalent of Ministerial directions (under current law) to EQC to perform additional functions.

<sup>14</sup> See definition of “natural disaster” in section 2, EQC Act. While the term “natural disaster” includes “natural landslip”, the definition of “natural landslip” in section 2, EQC Act expressly excludes the movement of ground due to “below-ground subsidence”. A report prepared by Tonkin & Taylor dated 14 December 2001 stated that “The collapse event can be categorised as below-ground subsidence in terms of the Earthquake Commission Act 1993, and therefore is not classified as a natural disaster by the Act.”

<sup>15</sup> See NZ Herald article *Waihi collapse victims get \$1.6m compensation* (17 January 2002) [https://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=686737](https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=686737)

<sup>16</sup> See paragraph 1(ii), Notice from Hon Dr Michael Cullen, Minister of Finance to EQC dated 11 February 2002 <https://gazette.govt.nz/notice/id/2002-go1094>

- 17 Under a December 2010 Direction, the Minister of Finance directed EQC to carry out certain additional land remediation work in Canterbury.<sup>17</sup> Among other things, EQC was directed to prepare a concept design report for this remediation work.
- 18 The proposed work was to be as per the scope and nature of the land remediation work broadly outlined for “Zone C” land in the Stage 2 Report prepared by Tonkin & Taylor Limited.<sup>18</sup> Zone C was land which had generally suffered very severe or major land damage. The proposed work involved for example, perimeter treatment works and land rafting.<sup>19</sup> The perimeter works would have included a series of compacted gravel columns placed under the ground surface on both private and public land in certain areas around the banks of the Avon River. The Stage 2 Report stated that in future events this treatment should mitigate the potential for very severe to major land damage.
- 19 The December 2010 Direction also required EQC to carry out works to mitigate the lateral spread of the land at Nos 3 to 8 Riverside Lane, Spencerville, which was damaged as a direct result of the Canterbury earthquake.
- 20 A further Direction in April 2011<sup>20</sup> required EQC to perform its roles and responsibilities under a Memorandum of Understanding between EQC and Waimakariri District Council (MOU).<sup>21</sup> The MOU covered proposed land remediation works at Kaiapoi, Pines Beach and Kairaki Beach. EQC’s responsibilities under the MOU included preparing the concept design report for the additional land remediation works,<sup>22</sup> obtaining Crown approval to proceed on the basis of the concept design report, obtaining resource consents, obtaining access and acquisition rights in respect of private land where necessary, and approving payments.

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<sup>17</sup> The Direction was effective on 14 December 2010. See Earthquake Commission, *Annual Report 2010–11* (2011), at pages 74-75). [https://www.eqc.govt.nz/sites/public\\_files/eqc-annual-report-2010-11.pdf](https://www.eqc.govt.nz/sites/public_files/eqc-annual-report-2010-11.pdf)

<sup>18</sup> See Tonkin & Taylor Limited, *Darfield Earthquake 4 September 2010 Geotechnical Land Damage Assessment & Reinstatement Report Stage 2 Report* (November 2010) at pages 3-4. <https://www.eqc.govt.nz/canterbury-earthquakes/land-claims/land-reports/stage-2-land-reports>

<sup>19</sup> For diagrams showing example remediation options, see Tonkin & Taylor Limited, *Darfield Earthquake 4 September 2010 Geotechnical Land Damage Assessment & Reinstatement Report Stage 2 Report* (November 2010) at pages 10-11 and Appendix B. <https://www.eqc.govt.nz/canterbury-earthquakes/land-claims/land-reports/stage-2-land-reports>

<sup>20</sup> See Direction made by Hon Gerry Brownlee, Minister for Canterbury Earthquake Recovery to EQC effective 18 April 2011. See Earthquake Commission, *Annual Report 2010–11* (2011), at pages 78-79. [https://www.eqc.govt.nz/sites/public\\_files/eqc-annual-report-2010-11.pdf](https://www.eqc.govt.nz/sites/public_files/eqc-annual-report-2010-11.pdf)

<sup>21</sup> MOU: *Waimakariri District Land remediation* between EQC and Waimakariri District Council signed in April 2011.

<sup>22</sup> The development of the Concept Design Report involved for example, undertaking a ground investigation programme in all areas, designing the systems, understanding the programme of works for Council services relocation and how best to co-ordinate that programme with the land remediation, identifying all enabling works (and scoping and pricing the same), preparing a staging programme, preparing a risk management programme, establishing a delivery strategy, repairing a robustly tested price estimate, and seeking input from the Waimakariri District Council throughout the process.

- 21 These two Directions (December 2010 and April 2011) conferred on EQC additional land remediation functions that did not fall within the ambit of the existing provisions of the EQC Act. Although the functions (if performed) may well have assisted in mitigating some residential land damage in future events, the planned remediation was well outside the EQC customers' insurance entitlements for residential land damage under the EQC Act.
- 22 In the end, the area-wide additional land remediation proposals that were the subject of these two Directions were abandoned after the red zoning of the areas where the remediation was originally proposed. The work at Spencerville did however proceed.<sup>23</sup>

#### DIRECTION TO PERFORM EMERGENCY REPAIRS – FEBRUARY 2011 CANTERBURY EARTHQUAKE

- 23 Very soon after the 22 February 2011 Canterbury earthquake, a decision was taken that Fletcher Construction Limited (Fletcher) would redeploy its Fletcher EQR resources to the emergency repair of dangerous or insecure residential premises (insured and uninsured) across Canterbury.<sup>24</sup> Further, the Rapid Assessment Programme conducted by EQC soon after the 22 February 2011 earthquake required the individual inspection of approximately 180,000 residential premises (insured and uninsured).
- 24 With the Rapid Assessment Programme and the emergency repair work already underway, a retrospective Ministerial Direction<sup>25</sup> was put in place to confer additional functions on EQC.
- 25 To the extent that this inspection and emergency work was not already covered by EQC's existing functions under the EQC Act, EQC was required under the Direction to carry out (so far as is reasonably practicable):
- a inspections of residential premises (insured and uninsured);<sup>26</sup> and
  - b emergency works to repair damage to dangerous or insecure residential premises (insured and uninsured);<sup>27</sup>

arising from the 22 February 2011 and aftershocks.

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<sup>23</sup> This work included the construction of underground stone columns forming an underground 'wall' adjacent to the Styx River on land next to, and on parts of, Nos 3 to 8 Riverside Lane, Spencerville. This Riverside Lane land area had been identified as an ideal site to pilot these ground improvement techniques.

<sup>24</sup> See Dominion Post article, *Fletchers redirects reconstruction efforts*, (23 February 2011).

<sup>25</sup> The Direction was signed 23 March 2011. See <https://gazette.govt.nz/notice/id/2011-go2390>

<sup>26</sup> "Residential premises" were defined to mean residential premises (whether or not the residential premises have EQC cover under the EQC Act).

<sup>27</sup> "Dangerous or insecure residential premises" were defined to mean residential premises which, in the opinion of EQC: were likely to cause injury or death (whether by collapse or otherwise), were likely to be seriously injurious to health because they are in a state of disrepair, were likely to cause damage to other property (whether by collapse or otherwise), had insufficient or defective provision against moisture penetration so as to give rise to the risk of water ingress into the premises or into any adjoining premises, or were not secured against unauthorised entry.



- 26 The Direction applied from 12.51pm on 22 February 2011 (the time of the earthquake) up to and including 30 April 2011. The work covered by the additional functions under the Direction was separately funded by the government.

#### DIRECTION TO REINSTATE LAND – APRIL 2017 EDGECUMBE FLOOD

- 27 Soon after the Edgcumbe flood in April 2017, it was recognised that there were efficiencies for EQC and the Edgcumbe community in having one single entity contract for the removal of the silt and debris that had inundated the town. In order for EQC to undertake this work on land that was non-residential and/or uninsured (i.e. outside the scope of the EQC Act), a Direction was required to confer additional functions on EQC.<sup>28</sup>
- 28 The Direction was put in place on 1 May 2017. The Crown funded the costs incurred by EQC in carrying out the functions under the Direction that were outside the scope of the EQC Act. At the time the Direction was given, the intention was that there would be some form of cost sharing with the Whakatāne District Council.

#### SUMMARY – DIRECTIONS THAT INTRODUCE NEW FUNCTIONS OUTSIDE THE CORE BUSINESS OF EQC

- 29 The Directions outlined above took EQC outside its core business. They conferred functions that were:
- a unrelated to a “natural disaster” (the Waihi goldmine collapse Notices);
  - b outside the scope of EQC’s insurance cover (the additional land remediation Directions);
  - c unrelated to insured residential premises (the emergency repair Direction and the Edgcumbe Direction).
- 30 The EQC Act and the Crown Entities Act contain no express restrictions on the Minister making Directions that take EQC away from its core business. Notably in this regard, the EQC Act has no purpose statement. However, any decision by the Minister to make a Direction is governed by usual public law principles.

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<sup>28</sup> See Direction effective 1 May 2017 <https://gazette.govt.nz/notice/id/2017-au2688>

*Category 2 – Directions that introduce new functions that extend EQC’s existing functions*

- 31 Some Directions have been put in place in recent years where unforeseen circumstances have given rise to a “gap” in the EQC residential insurance cover, leading to a potential inequity for some customers.
- 32 The two types of Directions in this category are:
- a Directions to cover pay outs (or repairs) for residential building and residential land damage apportioned to unclaimed-for events in the Canterbury earthquake sequence; and
  - b the Direction to cover pay outs (or repairs) for the damage to certain storm water and sewerage services (and structures appurtenant to them) that were outside the scope of the existing EQC Act.
- 33 The background and circumstances of these Directions are outlined briefly below.

DIRECTIONS REGARDING UNCLAIMED-FOR EVENTS – CANTERBURY EARTHQUAKES

- 34 In 2012, EQC identified an issue where a part of the damage to a residential building had been apportioned by EQC to an event in the Canterbury earthquake sequence where the customer had not made a valid claim. At the time of the Canterbury earthquake sequence, customers had three months to lodge a claim from the date of the damage. The customer could have made a claim in respect of an event at the time – but in 2012 they were too late to make another claim. Without a valid claim (and in the absence of a Ministerial Direction), EQC was unable to pay for damage apportioned to the “unclaimed-for” event.
- 35 To address this issue, the Minister Responsible for the Earthquake Commission put in place three Directions<sup>29</sup> such that EQC could pay out for (or repair) damage for the unclaimed-for event, where the customer had made a valid claim for at least one other event in the Canterbury earthquake sequence. Two of these Directions applied to residential building exposures and one Direction applied to residential land exposures.

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<sup>29</sup> See Direction effective 19 December 2012 <https://gazette.govt.nz/notice/id/2013-go8055>, Direction effective 2 December 2013 <https://gazette.govt.nz/notice/id/2013-go7997>, Direction effective 20 October 2015 <https://gazette.govt.nz/notice/id/2015-au6388>

36 In making these Directions, it was recognised that EQC would have had significant legal, engineering, communication and reputational issues in refusing to pay out for (or repair) unclaimed-for damage in this scenario. For example, in the case of complex land claims, the damage would often not be observed by the customer, so there were good reasons for the customer not making a claim for every event at the time.

#### DIRECTION REGARDING DRAINAGE – CANTERBURY EARTHQUAKES

37 The Direction effective 9 August 2016<sup>30</sup> addresses two drainage scenarios:

- a where the drains service for example, a garage, but not the insured dwelling; and
- b where the drains service an insured dwelling but cross a legally separate property. This resulted in the drains being “used but not owned”.

38 These scenarios became apparent in a September 2015 EQC pilot for cash settlement of drainage claims. In each of the scenarios above, the existing provisions of the EQC Act did not provide cover for the drains.

39 The Direction conferred on EQC the additional function of covering these two scenarios. In its briefing to the Minister on the issue, EQC noted the challenges of claimant expectations about cover; equity considerations; and administrative considerations (regarding distinguishing between drains that were covered or not covered). EQC accordingly recommended that the Minister make the Direction.

#### SUMMARY – DIRECTIONS THAT INTRODUCE NEW FUNCTIONS THAT EXTEND EQC’S EXISTING FUNCTIONS

40 The Directions outlined above conferred additional functions on EQC that “filled the gaps”. They allowed pay outs and repairs in scenarios that were unforeseen at the outset, but which became apparent to EQC during the processing of claims. In these scenarios, it seemed that, having regard to the broad intention of the EQC Act, the cover should be available.

41 Each of these Directions was separately funded by the government.

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<sup>30</sup> See <https://gazette.govt.nz/notice/id/2016-go4912>

*Category 3 – Directions regarding EQC’s investment of the Natural Disaster Fund*

- 42 Since 1 January 1994, EQC has been the subject of numerous Ministerial Directions as to the policies, standards and procedures for the investment of the Fund.<sup>31</sup> While some other Crown Financial Institutions (CFIs) were subject to legislative restrictions regarding investment,<sup>32</sup> EQC’s investments were restricted by means of Ministerial Direction.
- 43 Some of the investment restrictions applying to EQC through Ministerial Direction corresponded with the restrictions imposed on the other CFIs by legislation. For instance, some of the provisions in the Direction to EQC of 1 November 2001 mirrored provisions in the legislation put in place for other CFIs at about the same time. An example is the provision that required EQC to invest the Fund on a prudent, commercial basis and in doing so, manage and administer the Fund in a manner consistent with:
- a best practice portfolio management;
  - b maximising return without undue risk to the Fund as a whole; and
  - c avoiding prejudice to New Zealand's reputation as a responsible member of the world community.<sup>33 34</sup>
- 44 Among other things, this provision was designed to enable EQC (and the other CFIs) to diversify investments into a broader range of assets, including domestic and international equities and international bonds. The approach was contrasted with the previous types of investment restrictions and (in the case of, for example, EQC and the Government Superannuation Fund Authority) previous portfolios of predominately domestic bonds and cash.

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<sup>31</sup> See Direction effective 17 January 1994. We have been unable to locate a copy of this Direction (but it is referred to in other Directions (below) that we have located):

- Direction effective 12 December 1995 <https://gazette.govt.nz/notice/id/1995-go8345>;
- Direction effective 2 June 1998 <https://gazette.govt.nz/notice/id/1998-go3799>;
- Direction effective 1 November 2001 <https://gazette.govt.nz/notice/id/2001-go7946>;
- Direction effective 15 September 2010 <https://gazette.govt.nz/notice/id/2010-go7310>;
- Direction effective 15 September 2011 <https://gazette.govt.nz/notice/id/2013-go8016>;
- Direction effective 11 September 2014 <https://gazette.govt.nz/notice/id/2014-go6006>;
- Direction effective 27 July 2015 <https://gazette.govt.nz/notice/id/2015-go4515>.

<sup>32</sup> See, for example, sections 58 to 61, New Zealand Superannuation and Retirement Income Act 2001 which restrict the investment of the New Zealand Superannuation Fund by the Guardians. See also sections 15J to 15M, Government Superannuation Fund Act 1956, which restrict the investment of the Government Superannuation Fund by the Government Superannuation Fund Authority.

<sup>33</sup> See para (iv) of the Direction effective 1 November 2001 <https://gazette.govt.nz/notice/id/2001-go7946>

<sup>34</sup> See section 58, New Zealand Superannuation and Retirement Income Act 2001. See also section 15J, Government Superannuation Fund Act 1956.

## Comment

- 45 The expansion of EQC's roles and functions through a series of Ministerial Directions enabled EQC to help support the broader recovery of communities in the aftermath of the Waihi goldmine collapse, the Canterbury earthquake sequence and the Edgumbe floods. At the time of each Direction, it appears that there was no other agency within the broader state sector that was deemed to have the necessary skills to support that particular community's recovery. It appears there was high trust and confidence in EQC being able to deliver quality results for the particular community's recovery.
- 46 Some Directions, such as the unclaimed damages Directions and the drainage Direction, have addressed difficult scenarios that did not emerge until quite late in the Canterbury earthquakes claims management process. These Directions likely had the effect of:
- a pre-empting disputes between EQC and affected customers;
  - b containing reputational risk, especially in view of the late stage at which these issues emerged;
  - c avoiding scenarios that would have been very difficult to communicate to customers. For example, the position with respect to unclaimed-for damage, if the Directions had not been put in place; and
  - d avoiding scenarios which would have been difficult (if not impossible) to administer. For example, this would be the case if EQC was required to distinguish between a dwelling's drains that were covered or not covered.

## Possible ideas for further exploration

- 47 We have identified a few ideas that the Inquiry may wish to explore in its consideration of the utility of Ministerial Directions.

### *Putting in place parameters around the exercise of the Ministerial Directions power*

- 48 The current EQC Act places some parameters around the exercise of the power to make Ministerial Directions. The key provisions related to Ministerial Directions are:
- a section 5 – which sets out the functions of the EQC; and
  - b section 12 – which sets out the factors the Minister may take account of in issuing Directions. These factors mainly relate to the process of making Directions, with some particular factors to be considered relating to administering the Fund and obtaining reinsurance.

- 49 The Crown Entities Act 2004 also sets out some process and other restrictions around the making of Ministerial Directions.
- 50 The EQC Act lacks a clear statement of its purpose. The Legislative Design and Advisory Committee's *Legislation Guidelines*<sup>35</sup> emphasise the importance of having purpose provisions in legislation. The Treasury's 2015 Review of the EQC Act<sup>36</sup> commented that the absence of a purpose statement has created uncertainty about how best to interpret some provisions.
- 51 The 2015 Review of the EQC Act recommended that the new Act include a purpose statement. Including a purpose statement in the governing legislation would provide an indication of how the powers outlined in the EQC Act should be exercised, including under what circumstances Ministerial Directions could be made. A clear purpose statement could also be supported by a set of principles or objectives that are either provided for in the governing legislation or in the policy underpinning the legislation.

### *Pre-defining the roles and functions of EQC*

- 52 Not all functions that have needed to be undertaken by EQC could be predicted. While arguably the roles and expectations of EQC could have been better defined before the Canterbury earthquake sequence, some functions conferred on EQC through Directions were outside the limits of EQC Act. The Ministerial Directions provided the flexibility to confer new functions on EQC, in the absence of other organisations to perform those functions.<sup>37</sup>
- 53 There may be scope for defining and legislating in advance for some additional functions for EQC that would likely need to be performed after a natural disaster. This exercise could be coupled with the broader government conversation about "roles and expectations" of EQC.
- 54 One option could be for EQC's governing legislation to include a set of supplementary pre-defined roles that could be simply activated after a natural disaster occurs that reaches a certain threshold (e.g. as to magnitude or impact). This approach would obviate the need for preparing and arranging for a Ministerial Direction for these pre-defined additional functions. However, if this approach is adopted, there may also be merit in leaving the Minister with at least some broad powers to make Ministerial Directions to cover exceptional circumstances. We are conscious that in case of a natural disaster not every outcome can be foreseen.

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<sup>35</sup> Legislation Design and Advisory Committee "Legislation Guidelines" 2018 edition, Chapter 2 <http://ldac.org.nz/assets/Uploads/4016e0adf9/Legislation-Guidelines-2018-edition.pdf>

<sup>36</sup> *The Treasury, New Zealand's Future Natural Disaster Insurance Scheme - Proposed changes to the Earthquake Commission Act 1993 - Discussion Document* (July 2015) at page 19.

<sup>37</sup> For example, as a result of the structural changes in the state sector in the late 1980s and early 1990s, the New Zealand government no longer had a public works department.

*Restrictions on directions that bring about particular result for a particular person*

- 55 Under the Crown Entities Act, there are restrictions on Ministerial Directions that bring about a particular result for a particular person. There is perhaps scope to consider whether there is a role for Ministerial Directions (or a similar mechanism) to deal with selected situations where an unanticipated inequitable scenario affects a particular individual. Such a Ministerial Direction would have all the advantages listed in the paragraph immediately above, but apply for a particular customer (as opposed to a group of customers).
- 56 If there is concern that Ministerial Directions that bring about a particular result for a particular person might compromise the position of the Minister or EQC, then an alternative mechanism could be adopted.

**Update on Independent Ministerial Adviser Report recommendations**

- 57 In the Independent Ministerial Adviser (IMA) Report of April 2018,<sup>38</sup> the IMA considered whether Ministerial Directions could play a role in resolving unsettled Canterbury earthquakes claims. Specifically, the IMA:
- a recommended that EQC and Treasury work together on a proposal that could be put to the Minister to determine whether the Minister supports a Ministerial Direction that would allow EQC to reimburse certain legitimate claim-related costs in certain circumstances;<sup>39</sup> and
  - b noted that EQC management had given advice to the EQC Board (in March 2018) that their preferred approach to resolving on-sold over-cap claims was for the Minister to consider making a Ministerial Direction (because a Direction would allow for resolution of the on-sold over-cap claims, without the claimants having to undertake costly and lengthy court proceedings. The IMA noted that there were some very complex issues with on-sold properties which required more policy work, and recommended that EQC Management engage with Treasury to seek clarity on the government’s policy position.<sup>40</sup>
- 58 While there has been constructive engagement between EQC and Treasury on these matters, at the time of writing no Ministerial Directions have been put in place in respect of them.

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<sup>38</sup> Independent Ministerial Advisor *Report of the Independent Ministerial Advisor to the Minister Responsible for the Earthquake Commission* (26 April 2018).

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

<sup>39</sup> Ibid, at pages 15-16.

<sup>40</sup> Ibid, at pages 20-21.

## APPENDIX

### MINISTERIAL DIRECTIONS TO EQC –1 January 1994 to 7 March 2019

#	Effective Date	Nature of Ministerial Direction	Minister who gave Direction	Gazette reference	Still in force?	Comments
1	17 January 1994	A Direction relating to investment policy.	Unknown	N/A	No. Replaced by Direction effective 2 June 1998	9(2)(b)(ii)
2	12 December 1995	A Direction regarding the hedging of EQC's foreign exchange exposure.	Rt Hon Bill Birch (Minister of Finance)	Notice number: 1995-go8345 Page Number: 4773 <a href="https://gazette.govt.nz/notice/id/1995-go8345">https://gazette.govt.nz/notice/id/1995-go8345</a>	No. Replaced by Direction effective 2 June 1998	
3	2 June 1998	A Direction as to the policy to be followed by EQC in the exercise of its investment powers.	Rt Hon Bill Birch (Minister of Finance)	Notice Number: 1998-go3799 Page Number: 1697 <a href="https://gazette.govt.nz/notice/id/1998-go3799">https://gazette.govt.nz/notice/id/1998-go3799</a>	No. Revoked by Direction effective 1 November 2001	
4	1 November 2001	A Direction regarding the investment of the Natural Disaster Fund (NDF) (including e.g. to invest the NDF with certain investment objectives; and on a prudent, commercial basis).	Hon Dr Michael Cullen (Minister of Finance)	Notice Number: 2001-go7946 Page Number: 3830 Issue Number: 155 <a href="https://gazette.govt.nz/notice/id/2001-go7946">https://gazette.govt.nz/notice/id/2001-go7946</a>	No. Revoked by Direction effective 27 July 2015	



#	Effective Date	Nature of Ministerial Direction	Minister who gave Direction	Gazette reference	Still in force?	Comments
5	11 February 2002	<p>A Notice conferring the following functions on EQC:</p> <ul style="list-style-type: none"> <li>to investigate 12 homes damaged or endangered by the collapse of the gold mine in Waihi on 13 December 2001;</li> <li>to assess the damage or endangerment to the 12 homes;</li> <li>to provide the Treasury with the results of the assessments and advise the amounts to be paid by the Crown ex-gratia; and</li> <li>to advise the Minister of Finance about any other matters relating to the assessments as requested from time to time.</li> </ul>	Hon Dr Michael Cullen (Minister of Finance)	<p>Notice Number: 2002-go1094 Page Number: 482 Issue Number: 16 <a href="https://gazette.govt.nz/notice/id/2002-go1094">https://gazette.govt.nz/notice/id/2002-go1094</a></p>	Yes	9(2)(b)(ii)

#	Effective Date	Nature of Ministerial Direction	Minister who gave Direction	Gazette reference	Still in force?	Comments
6	1 October 2002	<p>A Notice conferring the following functions on EQC in relation to the Waihi gold mine collapse (see above):</p> <ul style="list-style-type: none"> <li>to organise and oversee the valuation of affected homes on the basis of a fair and reasonable market value;</li> <li>to identify the locality of properties in the high and medium subsidence zones;</li> <li>to establish if any homes can be removed, the costs of removal, and availability and costs of suitable alternate locations; and</li> <li>to advise the Minister of Finance about any other matters relating to the investigation as requested from time to time.</li> </ul>	Hon Trevor Mallard (Acting Minister of Finance)	<p>Notice Number: 2002-go6746 Page Number: 3901 Issue Number: 150 <a href="https://gazette.govt.nz/notice/id/2002-go6746">https://gazette.govt.nz/notice/id/2002-go6746</a></p>	Yes	9(2)(b)(ii)
7	15 September 2010	<p>A Direction amending the Direction effective 1 November 2001 (now revoked) directing EQC how to invest the NDF. Amendments relate to:</p> <ul style="list-style-type: none"> <li>types of investments permitted; and</li> <li>portfolio composition for which EQC was required to consult with the Minister.</li> </ul>	Hon Bill English (Minister of Finance)	<p>Notice Number: 2010-go7310 Page Number: 302 Issue Number: 124 <a href="https://gazette.govt.nz/notice/id/2010-go7310">https://gazette.govt.nz/notice/id/2010-go7310</a></p>	No	9(2)(b)(ii)

#	Effective Date	Nature of Ministerial Direction	Minister who gave Direction	Gazette reference	Still in force?	Comments
8	14 December 2010	<p>A Direction to EQC to perform the following additional functions:</p> <ul style="list-style-type: none"> <li>• to investigate options for mitigating future earthquake damage to land damaged throughout the Canterbury region as a result of the Canterbury earthquake;</li> <li>• to prepare a concept design report for land remediation works in respect of the land which is identified as “Zone C” in the Stage 2 Report prepared by Tonkin &amp; Taylor Limited;</li> <li>• to do such other things as may be reasonably necessary to prepare for carrying out the land remediation works; and</li> <li>• to carry out works to mitigate the lateral spread of the land at Nos 3 to 8 Riverside Lane, Spencerville, which were damaged as a direct result of the Canterbury earthquake.</li> </ul>	Hon Bill English (Minister of Finance)	<p>The Direction does not appear to be published in the <i>Gazette</i>. But it does appear in the EQC Annual Report (see Earthquake Commission (2011). “Annual Report 2010–11” at 74-75).  <a href="https://www.eqc.govt.nz/sites/public_files/eqc-annual-report-2010-11.pdf">https://www.eqc.govt.nz/sites/public_files/eqc-annual-report-2010-11.pdf</a></p>	Yes.	<p>As this Direction was open-ended, there is no provision that brings it to an end except revocation, by notice under section 115(3A) of the Crown Entities Act 2004 (or its predecessor provision).</p>

#	Effective Date	Nature of Ministerial Direction	Minister who gave Direction	Gazette reference	Still in force?	Comments
9	23 March 2011	<p>A Direction to EQC to perform the additional function of carrying out, so far as is reasonably practicable and to the extent not already covered by EQC's existing functions under the EQC Act:</p> <ul style="list-style-type: none"> <li>• inspections of residential premises; and</li> <li>• emergency works to repair damage to dangerous or insecure residential premises;</li> </ul> <p>arising from the Canterbury earthquake event on 22 February 2011 and aftershocks or subsequent earthquakes.</p>	Hon Gerry Brownlee (Minister for Canterbury Earthquake Recovery)	<p>Notice Number: 2011-go2390 Page Number: 1208 Issue Number: 51 <a href="https://gazette.govt.nz/notice/id/2011-go2390">https://gazette.govt.nz/notice/id/2011-go2390</a></p>	No. Applied from 12.51pm on 22 February 2011 up to and including 30 April 2011.	9(2)(b)(ii)
10	18 April 2011	<p>A Direction to EQC to perform the following additional functions:</p> <ul style="list-style-type: none"> <li>• to enter into a Memorandum of Understanding between EQC and Waimakariri District Council (the MOU);</li> <li>• to carry out EQC's roles and responsibilities set out in the MOU (as amended from time to time); and</li> <li>• to carry out certain works before the approval of the Concept Design Report referred to in the MOU.</li> </ul>	Hon Gerry Brownlee (Minister for Canterbury Earthquake Recovery)	<p>The Direction does not appear to be published in the <i>Gazette</i>. But it does appear in the EQC Annual Report (see Earthquake Commission (2011). "Annual Report 2010–11" at 78-79). <a href="https://www.eqc.govt.nz/site/public_files/eqc-annual-report-2010-11.pdf">https://www.eqc.govt.nz/site/public_files/eqc-annual-report-2010-11.pdf</a></p>	Yes. As this Direction was open-ended, there is no provision that brings it to an end except revocation by notice under section 115(3A) of the Crown Entities Act 2004 (or its predecessor provision).	9(2)(b)(ii)

#	Effective Date	Nature of Ministerial Direction	Minister who gave Direction	Gazette reference	Still in force?	Comments
11	15 September 2011	<p>A Direction amending the Direction that was effective 1 November 2001 (now revoked) directing EQC how to invest the NDF. Amendments relate to:</p> <ul style="list-style-type: none"> <li>• types of investments permitted; and</li> <li>• portfolio composition for which EQC was required to consult with the Minister.</li> </ul>	Hon Bill English (Minister of Finance)	<p>Notice Number: 2013-go8016 Page Number: 4559 Issue Number: 167 <a href="https://gazette.govt.nz/notice/id/2013-go8016">https://gazette.govt.nz/notice/id/2013-go8016</a></p>	No	9(2)(b)(ii)
12	19 December 2012	A Direction to EQC to perform the additional function of paying out on residential building damage apportioned to unclaimed-for events.	Hon Gerry Brownlee (Minister Responsible for the Earthquake Commission)	<p>Notice Number: 2013-go8055 Page Number: 4712 Issue Number: 172 <a href="https://gazette.govt.nz/notice/id/2013-go8055">https://gazette.govt.nz/notice/id/2013-go8055</a></p>	Yes	9(2)(b)(ii)

#	Effective Date	Nature of Ministerial Direction	Minister who gave Direction	Gazette reference	Still in force?	Comments
13	2 December 2013	A Direction amending the Direction effective 19 December 2012 such that no excess applies in respect of the unclaimed-for event.	Hon Gerry Brownlee (Minister Responsible for the Earthquake Commission)	Notice Number: 2013-go7997 Page Number: 712 Issue Number: 172 <a href="https://gazette.govt.nz/notice/id/2013-go7997">https://gazette.govt.nz/notice/id/2013-go7997</a>	Yes	
14	11 September 2014	A Direction extending the Direction effective 15 September 2011.	Hon Gerry Brownlee (Minister Responsible for the Earthquake Commission)	Notice Number: 2014-go6006 Page Number: 3343 Issue Number: 119 <a href="https://gazette.govt.nz/notice/id/2014-go6006">https://gazette.govt.nz/notice/id/2014-go6006</a>	No	9(2)(b)(ii)

#	Effective Date	Nature of Ministerial Direction	Minister who gave Direction	Gazette reference	Still in force?	Comments
15	27 July 2015	A Direction to ensure EQC invests the NDF conservatively and maintains its liquidity to meet claims in the aftermath of the Canterbury earthquake sequence.	Hon Gerry Brownlee (Minister Responsible for the Earthquake Commission)	Notice Number: 2015-go4515 Issue Number: 87 <a href="https://gazette.govt.nz/notice/id/2015-go4515">https://gazette.govt.nz/notice/id/2015-go4515</a>	Yes	9(2)(b)(ii)

#	Effective Date	Nature of Ministerial Direction	Minister who gave Direction	Gazette reference	Still in force?	Comments
16	20 October 2015	A Direction to EQC to perform the additional function of paying out on residential land damage apportioned to unclaimed-for events.	Hon Gerry Brownlee (Minister Responsible for the Earthquake Commission)	Notice Number: 2015-au6388 Issue Number: 117 <a href="https://gazette.govt.nz/notice/id/2015-au6388">https://gazette.govt.nz/notice/id/2015-au6388</a>	Yes. The Direction applied from September 2010 and was open-ended.	9(2)(b)(ii)



#	Effective Date	Nature of Ministerial Direction	Minister who gave Direction	Gazette reference	Still in force?	Comments
17	9 August 2016	A Direction to EQC to perform the additional function of paying the amount of the damage to, or replacing or reinstating (at EQC's option), certain storm water and sewerage services (and structures appurtenant to them) that suffered damage as the direct result of one or more of the 2010-11 Canterbury earthquakes. The payments are subject to certain conditions being met, as set out in the Direction.	Hon Gerard Brownlee (Minister Responsible for the Earthquake Commission)	Notice Number: 2016-go4912 Issue Number: 77 <a href="https://gazette.govt.nz/notice/id/2016-go4912">https://gazette.govt.nz/notice/id/2016-go4912</a>	Yes. This Direction expires on 30 June 2021 unless revoked earlier.	9(2)(b)(ii)

#	Effective Date	Nature of Ministerial Direction	Minister who gave Direction	Gazette reference	Still in force?	Comments
18	1 May 2017	A Direction to EQC to perform the additional function of reinstating land in the Edgecumbe community that was damaged as a result of any storm or flood occurring in April 2017.	Hon Gerry Brownlee (Minister Responsible for the Earthquake Commission)	Notice Number: 2017-au2688 Issue Number: 58 <a href="https://gazette.govt.nz/notice/id/2017-au2688">https://gazette.govt.nz/notice/id/2017-au2688</a>	No. The Direction applied from 4 April 2017 and expired on 4 April 2018.	9(2)(b)(ii)