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Committee Secretariat
Governance and Administration Committee
Parliament Buildings
Wellington

Dear Committee Members,

ICNZ submission on Canterbury Earthquakes Insurance Tribunal Bill

Thank you for the opportunity to submit on the Canterbury Earthquakes Insurance Tribunal Bill (**the Bill**). ICNZ represents general insurers who insure about 95 percent of the New Zealand general insurance market, including over half a trillion dollars' worth of New Zealand property and liabilities. This submission is made on behalf of the ICNZ members who still have unresolved Canterbury Earthquake claims – IAG, Vero, Tower, AA Insurance, FMG, and MAS. While Southern Response is also an associate member of ICNZ, given their unique status as a government-owned company, they have opted to provide their own separate submission.

Please note that individual members may also submit to you separately.

We wish to appear before the Committee to speak to our submission.

Please contact Jane Brown (jane@icnz.org.nz or 04 495 8008) if you have any questions on our submission or require further information.

This submission is in two main parts:

- Overarching Comments
- Analysis of the Bill

Overarching Comments

1. Settlement of claims

1.1 ICNZ is pleased to see the Government looking to expedite the resolution of unresolved Canterbury Earthquake claims. Insurers continue to be committed to finalising the remaining claims.

1.2 There have been numerous factors beyond private insurers' control which have contributed to drawn-out settlements for some claimants and it is regrettable that there are claims that still await resolution. The Canterbury Earthquakes were a disaster the scale of which has not been witnessed in this country before. If a similar event occurs in future, we have learned valuable lessons to ensure a speedier return to normalcy.

1.3 In total, private insurers[1] received over-cap domestic claims for more than 19,500 properties (meaning claims where damage from a single event exceeds the EQC cap of $100,000 + GST and the claim is therefore handed over to the private insurer). For the six ICNZ members represented in this submission, roughly 5% of these claims are still unresolved, with new over cap claims still being received from EQC each month. This figure includes a not insignificant number of claims which are in the final stages of settlement, as well as claims already before the courts, and some claims which will not be eligible for a hearing before the Tribunal, for example because they relate to on-sold properties. This number will of course reduce further before the Tribunal's intended start date of 25 March 2019.

1.4 ICNZ members have also settled 64,188 domestic claims that are not within the scope of the EQC, of which 64,094, or 99.9% have been settled. In addition to this, insurers have received 26,275 commercial claims, of which 96.5% have been settled.

2. Lack of consultation

2.1 As is noted in the Ministry of Justice's Departmental Disclosure Statement, there was no consultation on the policy to be given effect by the Bill with EQC, Southern Response, claimants or private insurers.[2] It was further noted in the Regulatory Impact Statement that consultation on the options identified by the Ministry was undertaken with government agencies, but not with claimants or private insurers.[3] The lack of consultation on an important piece of legislation such as this is disappointing.

2.2 The Government's own Legislation Design and Advisory Committee stresses the importance of consultation in their Legislation Guidelines stating that "legislation is information-intensive and ensuring it is effective and reducing the risk of unintended consequences *requires consultation at all stages*"[4] (emphasis added). The Committee goes on to say that public consultation is not required or possible in all cases, but we do not believe that this is one of those instances. The Ministry of Justice had begun work towards the Tribunal by at least November 2017, yet the Bill was not released until 1 August 2018. There would have been ample opportunity within this timeframe to consult with interested parties prior to the release of the draft legislation.

2.3 In ICNZ's view, full public consultation should have been undertaken prior to the introduction of the legislation as this could have served to address or minimise many of the issues we see in the Bill and have outlined below.

3. Consideration of other options to speed up resolution of claims

3.1 We note the options and analysis set out in the Regulatory Impact Statement[5] prepared by the Ministry of Justice. The analysis concluded that a dedicated mediation service for claimants and insurers would be the most appropriate option and would be the Ministry's preferred option. However, the analysis went on to note that the Government's commitment to establishing a tribunal would likely mean that that would be the option they would take.

3.2 ICNZ supports the Ministry of Justice's view that the preferred option would have been to fund or part-fund a dedicated mediation service alongside increased resourcing for the current system (such as extending the role of the Residential Advisory Service, additional funding for

[1] Meaning IAG, Vero, Tower, AA Insurance, FMG, and MAS.
[2] https://www.justice.govt.nz/assets/Documents/Publications/bill-government-2018-82.pdf, at page 8.
[3] https://www.justice.govt.nz/assets/Documents/Publications/regulatory-impact-statement-canterbury-earthquakes-insurance-tribunal.pdf, at page 11.
[4] http://ldac.org.nz/assets/Uploads/Legislation-Guidelines-2018-edition.pdf, at page 9.
[5] Above n 3, at page 11.

legal advice, or increasing availability of experts and expediting court proceedings). We note that the Greater Christchurch Claims Resolution Service has attempted to do this.

Analysis of the Bill

We address some of our specific concerns with the provisions in the Bill below.

4. Clause 3 – Purpose

4.1 The purpose of the Bill is to provide "speedy, flexible, and cost-effective services" for resolving outstanding claims. While we agree that the proposed legislation achieves flexibility in its processes, we are not convinced that settlements will be speedy, and to a lesser extent, nor will they be more cost-effective than the existing options for claimants.

4.2 This Bill is based on the Weathertight Homes Resolution Services Act 2006 which established the Weathertight Homes Tribunal (WHT). Information from the WHT on settlement of claims shows that on average, it took 390 days to move from lodgement to settlement, or to a formal hold (meaning the case is on hold when there is work associated with a settlement that must be completed before the case can be formally closed). We would query whether this meets the definition of "speedy". We are sceptical as to whether the process under the proposed Canterbury Earthquake Insurance Tribunal will be any different.

4.3 In our experience the main causes of delay are a shortage of experts and judicial resources. Creating a different forum, merely shifts these delays to the Tribunal rather than resolving them.

4.4 We would also query whether the Tribunal will be cost-effective. We agree that on its own, a hearing in the Tribunal should be cheaper than a trial in the High Court. However, the Tribunal could just be another stepping stone in the judicial process with claims still ending up before higher courts, increasing the total cost and time to ultimate resolution.

5. Clause 8 – Application of Act

5.1 We believe that it is unclear whether the Tribunal's jurisdiction will include EQC defective repairs coming over cap, defective repairs funded by insurers, or defective rebuilds. This needs to be clarified. We are aware that there will likely be declaratory judgments required to determine the liability as between private insurers and the EQC in this area, but once there is clear legal precedent these should be capable of being heard by the Tribunal unless, in accordance with clause 28, the particular claim presents undue complexity or is novel.

Recommendation:

- **That the Bill clearly specify whether claims relating to EQC defective repairs coming over cap, defective repairs funded by insurers, and defective rebuilds are within the Tribunal's jurisdiction.**

6. Clause 10 – Bringing claim to tribunal

6.1 The Bill provides that only a policyholder or an insured person may bring a claim to the Tribunal against an insurer or the EQC (or both). This precludes the ability of insurers to bring a case to the Tribunal and to bring in other relevant parties to the claim before the Tribunal. It also prevents insurers from bringing claims that have reached an impasse to the Tribunal without the assistance of the insured. While we would not expect this to occur regularly, there may be occasions in the future where it would be in the best interests of the parties for the insurer to

be able to lodge the claim with the Tribunal for a decision to be made. For example, one member has dealt with a claim where the customer received an expert report which contained a proposed settlement figure considerably higher than what the insurer's expert advice suggested was reasonable. The customer then refused to enter into constructive discussions with the insurer or to seek updated expert views meaning that the claim is unable to progress. Other members have reported customers who, after filing a claim, have become uncontactable. Although offers to settle have been made to them by the insurer, they do not respond to any form of communication, so the claim remains open. Both of these examples may be able to be progressed if the insurer was able to lodge a claim in the Tribunal.

6.2 We note the Ministry of Justice's preference in their Regulatory Impact Statement – detailed design, for insurers to also be able to file claims. [6] We support this position and echo their words that access to justice should be favoured.

6.3 We further support the Ministry's view that should insurers have the right to lodge a claim in the Tribunal, that right should not be unfettered. ICNZ would support similar criteria to that proposed in the options identification and impact analysis. We submit that for insurers to file a claim in the Tribunal they must first make a reasonable attempt to obtain the homeowner's agreement. The inclusion of 'reasonable' will mean that the insurer must attempt to obtain agreement, but if for example, they do not receive a response from the homeowner within a set amount of time, they may lodge the claim.

6.4 The Ministerial Briefing of 13 June 2018[7] lends further support to insurers being able to lodge claims in the Tribunal. In the Briefing, Ministry of Justice officials advised against barring insurers to make a claim to the Tribunal as:

- restricting access to judicial processes is contrary to natural justice and procedural fairness, as parties are not treated as equal before the law;
- an insurer may have legitimate reasons for filing a claim in the Tribunal….;
- it may have the unintended effect of incentivising insurers to file claims in the courts…; and
- treating insurers differently to policyholders may reduce insurer confidence in the fairness of the New Zealand legal system, which may impact the future cost of insurance.

6.5 The Briefing goes onto conclude that both parties (policyholders and insurers) should be able to seek a determination in the Tribunal, and notes that given the precedent-setting nature of any proposal to limit the ability of insurers to access the Tribunal, and potential implications, the Minister may wish to discuss the issues in the paper with the Attorney-General. ICNZ wholly supports the Ministry of Justice's comments, and queries whether consultation with the Attorney-General on this point did take place.

6.6 Finally, if the aim of the Bill is to speed up resolution of outstanding earthquake insurance claims, the overall purposes of the legislation would not be served by preventing insurers from utilising the process.

Recommendation:

- **That the Bill also allow insurers to bring claims to the Tribunal where they have first made a reasonable attempt to obtain the homeowner's agreement to do so.**

[6] https://www.justice.govt.nz/assets/Documents/Publications/regulatory-impact-statement-canterbury-earthquakes-insurance-tribunal-detailed-design.pdf, at page 11.
[7] CRT-48-01.

7. Clause 11 – Additional parties and removal of parties

7.1 Under clause 11(4), a claim cannot continue in the Tribunal unless one respondent is the insured person. This means that if both the insurer and EQC have settled with the insured, but not with each other, the claim cannot continue. Likewise, a claim cannot continue between the insurer or EQC and a third party such as a builder or local authority. It seems ineffective and inefficient to leave aspects of a claim unresolved and to require parties to apply to court and start the process again. This will dissuade third parties from settling, knowing that a claim against them falls away, if a separate settlement is achieved with the home owner. This dynamic will dissuade any speedy settlements with homeowners if that would leave insurers to re-litigate the same issues a second time before a court, with the risk of inconsistent conclusions. We submit that if there is a dispute remaining between an insurer and/or EQC, and/or any third parties after the insured's claim has been settled, those proceedings should be allowed to remain in the Tribunal until they have been resolved amongst all parties.

Recommendation:

- **That the Bill allow for proceedings to remain in the Tribunal if there is a dispute remaining between an insurer and/or EQC, and/or any third parties after the insured's claim has been settled.**

8. Clause 12 – Claim brought by application to tribunal

8.1 Clause 12(3)(b) requires applications to the Tribunal to be in the form approved by the Tribunal. Clause 2 of Schedule 2 allows the Tribunal chairperson to issue practice notes on the type and quality of information and documentation required. We caution against the requirements being too simplified. We note that the District Court trialled documents to make pleadings more simplified, but this resulted in insufficient information being provided and the watered-down process was discontinued. We submit that the processes should be the same as are currently used in the High Court.

Recommendation:

- **That the Bill specify that processes for applying to the Tribunal are the same as are currently used in the High Court.**

9. Clause 15 – Response from respondent

9.1 ICNZ considers that the 15 working days to file a response required by clause 15(1) is too short. Respondents will have up to seven years of material to review and respond to on complex technical matters. This is too short a timeframe to be reasonably expected to respond.

9.2 ICNZ submits that respondents should have 25 working days to file a response – the same as what is allowed for filing a Statement of Defence with the High Court.

Recommendation:

- **That clause 15(1) of the Bill be rewritten as:**
  A respondent may file with the tribunal a written response and supporting documentation with *25* working days of being served a notice of the claim or within a later time period directed by the tribunal.

10. Clause 16 – Claim brought by transfer of proceedings from court

10.1 Only the insured can apply to have a case transferred from the court to the Tribunal. Insurers are unable to apply (although they will need to agree to a transfer if the insured, as respondent in the court, applies to move the proceedings to the Tribunal). In line with the argument raised in relation to clause 10 above, we believe that insurers should also be able to apply to transfer a claim to the Tribunal.

10.2 We note in clause 16(6) that if court proceedings are transferred to the Tribunal, the Tribunal *may* have regard to any notes of evidence transmitted. We submit that the Tribunal should be *required* to have regard to the notes of evidence in order to be able to fully comprehend the claim before them

Recommendations:

- **That the Bill also allow insurers to apply to transfer a claim from court to the Tribunal; and**
- **That if court proceedings are transferred to the Tribunal, the Bill should require the Tribunal to have regard to the notes of evidence.**

11. Clause 22 – Attendance at first case management conference

11.1 Clause 22(1) requires parties to attend the first case management conference. We do not believe that attendance by the party should be mandatory and their representative should be allowed to appear given that it is early in the process. Further to this, requiring all parties to appear may lead to more costs and potential delays.

11.2 If, contrary to the above, attendance is mandatory, then we submit that attendance should be permitted via audio or video conference. This would help to limit additional costs which would otherwise be incurred should the party have to appear in person.

Recommendations:

- **That the Bill state that attendance by the party at the first case management conference is not mandatory and their representative may attend in their place; or**
- **That if the above point is not accepted, the Bill should allow for attendance to be via audio or video conference.**

12. Part 2 Subpart 1 – Mediation

12.1 ICNZ is pleased to see the inclusion of provision for mediation and is of the view that this part of the Bill is well drafted. As noted in the Overarching Comments to this submission, we believe that an amplified mediation service could have been a more appropriate solution for expeditious resolution of the outstanding claims.

13. Clause 37 – Managing adjudication of claims and natural justice

13.1 ICNZ is pleased to see that the Tribunal must comply with the principles of natural justice, particularly noting the Minister's comments in the Cabinet Paper that consideration was given to whether the Tribunal should decide claims on equity and good conscience.[8] We agree with

[8] https://www.justice.govt.nz/assets/Documents/Publications/canterbury-earthquakes-insurance-tribunal-28-february-2018.pdf, at para [24].

the Minister's conclusion that this would have created uncertainty in the insurance market and upset existing principles of contract law.

13.2 Despite this, we see some issues with the drafting of clause 37. Firstly, in clause 37(2)(b), the Tribunal must not admit or permit irrelevant cross-examination. We believe that this power should be exercised with caution as it can be difficult to determine what is irrelevant in cross-examination if it is not allowed to be completed.

13.3 Secondly, clause 37(2)(c) requires the Tribunal to consider using conferences of experts to avoid duplication. We do not believe there should be any restriction on what evidence experts can or cannot provide over and above usual rules in court proceedings, which are well understood amongst experts.

13.4 Finally, under clause 37(4), the Tribunal is not required to permit cross-examination or the use of experts. While we recognise that the Tribunal may want to limit cross-examination and experts so as to ensure the process remains inquisitorial, we would argue the necessity of cross-examination, and experts in particular, by contrasting the circumstances of this Tribunal with that of the Weathertight Homes Tribunal. Decisions from the WHT show multiple claims against the architects, the builders, the local authority – the experts who undertook the allegedly defective work. This differs to the position of an insurer, who will have relied on their experts – the quantity surveyors, the loss adjusters etc – to make their decision. An insurer requires the admittance of expert witnesses in order to fully explain the reasoning upon which they based their decision in relation to a claim. We therefore do not believe that there should be any restriction on the use of experts.

13.5 In relation to cross-examination, to ensure fair process, instead of the current drafting, we believe the legislation should permit cross-examination unless all parties agree it should not be allowed for a particular hearing.

Recommendation:

- **That clause 37(2)(c) of the Bill be deleted;**
- **That the Bill permit the use of experts if the parties believe they are required; and**
- **That the Bill permit cross-examination unless all parties agree it should not be allowed for a particular hearing.**

14. Clause 40 – Expert advisers

14.1 ICNZ agrees with the requirement in clause 25(1) that expert advisers must act independently when assisting the Tribunal, but also strongly believe that they must be suitably qualified.

14.2 ICNZ also queries who will be responsible for instructing the experts, how they will be instructed, and what the scope of the experts' role will be. It is understandable that some disagreements between parties' experts arise because they have received differing instructions. It is therefore imperative that the independent experts are instructed impartially and precisely, and by a person with the requisite factual and technical knowledge so as to ensure a balanced outcome.

14.3 Finally, ICNZ notes and echoes the concerns raised by the Ministry of Justice in the Regulatory Impact Statement[9] and the Minister in the March Cabinet Paper[10] about the resource pool for expert advisers. Claims resolution has been slowed by the limited number of technical experts

[9] Above n 2.

[10] Above n 8, at para [37].

and the time it takes them to provide input into each claim. ICNZ is concerned that the addition of another forum for claim resolution will further exacerbate this problem.

14.4 It should be fully understood that in contrast to the WHT, where the Tribunal can rely on a single assessor's report setting out where the water is coming into the building and why, the issues in earthquake damage disputes are multi-disciplinary routinely using four or more different types of expert, including:

- structural engineers – structural damage and repair options;
- geotechnical engineers – land conditions for foundation repair and bearing capacity;
- building surveyors – extent of damage and scope of repair;
- cadastral surveyors – wall verticality and floor levels; and
- quantity surveyors – costing repair solutions.

15. Clause 41 – Hearing of claim

15.1 We request further clarification around the intended operation of clause 41(4). The Tribunal may decide a claim on the papers if it considers it appropriate. It is unclear whether this means a procedural decision can be made on the papers or whether the Tribunal can make a decision on the overall claim on the papers, without there being a hearing. We submit that it should be the former only. We also believe that allowing the parties "reasonable opportunity to comment" before making a decision is unhelpfully vague. We submit that there should also be more clarity on how much contribution parties can expect to have when a decision is to be made on the papers.

Recommendations:

- **That the Bill clarify that the Tribunal may only make a procedural decision on the papers; and**
- **That the Bill specify how much contribution parties should expect to have when a decision is to be made on the papers.**

16. Clause 44 – Tribunal's decision: substance

16.1 Clause 44(3) allows the Tribunal to award general damages for mental distress, which subclause (8) goes on to define as one or more of the following:

(a) emotional or mental anxiety:
(b) distress or stress.

16.2 We note that this appears to be an exact repeat of the general damages provision in the Weathertight Homes Resolution Services Act 2006. The difference between claims in each Tribunal has already been pointed out by a number of commentators – claims in the WHT are in tort, whereas the earthquakes claims are in contract.[11]

[11] Torts are civil wrongs, with tort obligations being imposed by law. The primary remedy in tort is damages which aim to put the plaintiff in the position they would have been in if the tort had not been committed. Contract, on the other hand is about agreement between parties. For there to be a legally binding contract there must be three essential elements – an offer, acceptance of that offer, and consideration (a promise to give something – usually money – in return for the benefit the party is receiving from the contract). There are a range of remedies for breach of contract including cancellation of the contract, specific performance, and damages.

16.3 The law in New Zealand is clear that general damages for mental distress cannot be recovered in contract law. It would therefore be wholly inappropriate to create a new class of general damages in this legislation.

16.4 Colinvaux's Law of Insurance, the leading authority on insurance law in New Zealand, states "the common law rule is that damages for emotional distress cannot be awarded under a policy of insurance, because an insurance contract is not designed to protect against such distress".[12] The book goes on to quote a case from the English courts where the court stated that "a contract of insurance is not one which has as its specific objective the assured's peace of mind".[13]

16.5 The first of three further issues we see with this proposed class of damages is that proper process for the introduction of such an award has not been followed. Full consultation should have been undertaken prior to the introduction of legislation seeking to alter existing common law.

16.6 The second issue is that the damages would apply retrospectively, for behaviour that occurred when no such award was possible. This contravenes the Legislation Guidelines which state:

> *Legislation should not affect existing rights and should not criminalise or punish conduct that as not punishable at the time it was committed. This presumption is part of the rule of law. The general rule is that legislation should have prospective, not retrospective, effect.*[14]

16.7 The third point to note is that there are policy considerations to be made if the Government is seeking to introduce a new claim in damages via this legislation. There are thousands of homeowners who have already had their claims settled and who, if this legislation had been enacted earlier, could have potentially claimed for damages had it been available at the time. We do not believe this is an equitable position.

16.8 As a further consideration, we are concerned about the signal that retrospective and novel law would give to offshore insurers and reinsurers. It suggests a higher level of political risk than New Zealand has previously presented. To counter these concerns, we believe that the Government should look to apply principles-based legislation which is predictable and foreseeable. Further to this point, we again note the Minister's apprehension about creating uncertainty in the insurance market.[15]

16.9 We strongly submit that the reference to mental distress in clause 44(3) and definition of mental distress in clause 44(8) be deleted from the Bill.

16.10 If Parliament is minded to include a jurisdiction for general damages, this already exists in relation to a breach of the insurer's duty of good faith, as recognised in *Tower v Young.*[16] Compensation should only follow on from a finding of a breach by an insurer and must be quantified rationally based on the Tribunal's objective view as to the actual loss caused by that breach.

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[12] Robert Merkin and Chris Nicoll *Colinvaux's Law of Insurance in New Zealand* (2nd ed, Thomson Reuters NZ Ltd, Wellington, 2017) at 590.

[13] *Ventouris v Mountain (The Italia Express) (No 3)* [1992] 2 Lloyd's Rep 281. This applies the general law of contract to the insurance contract context, restricting general damages for mental distress. The general law was established in *Addis v Gramaphone* [1909] AC 488 (HL) refined in *Watts v Morrow* [1991] 1 WLR 1421, approved and adopted by our Court of Appeal in *Bloxham v Morrow* in 1996 and further refined in by the House of Lords in *Farley v Skinner* in 2001.

[14] Above n 4, at para [4.7].

[15] Above n 8, at para [24].

[16] *Young v Tower Insurance Limited* [2016] NZHC 2956 [7 December 2016].

Recommendation:

- **That the reference to mental distress in clause 44(3) and the definition of mental distress in clause 44(8) be deleted.**

17. Clause 45 – Costs

17.1 Clause 45(3) means that parties must meet their own costs if a costs award is not made under subclause (1). We recognise that this is part of the intention to make the Tribunal a more cost-effective option for claimants. This provision will however, likely reduce the litigation risk incentive on parties to settle at mediation which could see an overall increase in litigated claims and rise in unmeritorious claims and/or inflated claims being lodged in the Tribunal. In our view, the successful party should be able to be awarded reasonable costs, especially if expert evidence has been required.

Recommendation:

- **That the Bill include the ability to award costs to the successful party.**

18. Clause 51 – Questions of law may be referred to High Court

18.1 Under clause 51 the Tribunal may refer questions of law to the High Court and the High Court's opinion will be binding. However, there is no ability for the parties to frame the question or make representations to the High Court on the matter, and we consider that there should be. This point is particularly relevant given our concerns around appointment in the paragraphs below.

18.2 It is important that questions of law are framed correctly. This is to ensure the High Court is able to make the appropriate determination, and so that time is not wasted by requiring further assistance if the intention in the original question was not answered because it was poorly framed.

Recommendation:

- **That the Bill provide provision for parties to assist in framing any questions to the High Court or to make representations to the Court on the matter.**

19. Clause 55 – Appointment of members of tribunal

19.1 Members of the Tribunal are appointed by the Governor-General on the recommendation of the Minister of Justice. Subclause (2) states that the Minister must recommend people who, in the Minister's opinion, are suitable to be appointed, taking into account their knowledge, skills, and experience. We see two issues with the provisions in clause 55, firstly, the robustness of the appointment process, and secondly, ensuring that the members of the Tribunal are suitably qualified.

19.2 In the Cabinet Paper of 28 February 2018 Minister Little stated that he expects to appoint member with "significant legal experience, for example, a minimum of seven years' experience in an appropriate area of law, or a former judge".[17] ICNZ is supportive of appointees with significant legal experience but are concerned that the same intentions are not reflected in the

[17] https://www.justice.govt.nz/assets/Documents/Publications/establishment-of-canterbury-earthquakes-insurance-tribunal.pdf, at page 8.

legislation. We also note that we would not consider seven years' experience as meeting the threshold of *significant* legal experience. We do however believe that a former judge would meet the threshold. These points are particularly important given Tribunal members will have the authority to exercise the same monetary jurisdiction of a High Court judge.

19.3 The appointed Tribunal members will play a critical role in the resolution of claims via the Tribunal process. If a number of the recommendations in this submission are not taken up, we are concerned that there is a very real risk that a Tribunal will be created whose integrity could easily be called into question. For instance, if the Tribunal were staffed by individuals with little or no legal expertise, inappropriate decisions about whether to allow the evidence of expert witnesses or what damages should be awarded could undermine its reputation and call into question its authority.

19.4 To counter the above concerns and to recognise the specialist expertise required for members of this Tribunal, appointments should be made using the same process as for judicial appointments. For appointments to the High Court, the Governor-General is advised by the Attorney-General, who receives advice from the Chief Justice and the Solicitor-General. We are confident that this process would be the most suitable and would recognise the importance of the work the Tribunal members will be undertaking.

19.5 ICNZ holds further concern around clause 55 in that the appointment process would seem to allow people who have had their own Canterbury Earthquake claims to be appointed as a member of the Tribunal. Clause 31 of Schedule 2 requires members to disclose conflicts of interest in relation to particular claims, but we believe they will be conflicted by having had a contentious insurance claim. In ICNZ's view, people who have had their own insurance claims, whether with EQC and/or a private insurer, should not be permitted to be appointed as a member of the Tribunal.

Recommendations:

- **That the Bill reflect the Minister's intention of having Tribunal members with significant legal experience; and**
- **That the Bill include provision for Tribunal appointments being made using the same process as for judicial appointments; and**
- **That the Bill be clear that people who have had their own insurance claims, whether with EQC and/or a private insurer, cannot be appointed as a member of the Tribunal.**

20. Clause 63 – Exclusion of liability

20.1 Clause 63 exempts expert advisers from liability, unless they have acted in bad faith. ICNZ believes that this exemption is too broad. We submit that liability should only be excluded if the expert adviser has exercised their duty with the care, diligence and skill of a reasonable person in that profession.

Recommendation:

- **That a statement that expert advisers will only exempt from liability under clause 63 where they have exercised their duty with the care, diligence and skill of a reasonable person in that profession be included.**

21. Schedule 2 Clause 3 – Representation and privilege of communications

21.1 ICNZ does not believe the Bill is clear what powers (if any) the Tribunal will have over the conduct of non-legally qualified representatives. Lawyers must comply with the Rules of conduct and client care under the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, but it appears that advocates may be held to a lesser standard. Clause 62 allows for the imposition of a fine for behaviour that is seen as contempt of the Tribunal, but we do not believe that this will disincentivise poor behaviour. At a minimum, we submit that the fine in clause 62(2) should be increased to $10,000.

21.2 Parliament should also consider requiring all advocates including lawyers to register with the Tribunal and empowering the Tribunal to deregister any advocate for egregious misconduct towards the Tribunal, their own client or the opponents.

21.3 Clause 3(2) of Schedule 2 states that if a party's representative is not legally qualified, any communications between the party and their representatives are privileged to the extent that the communications would be if the representative were legally qualified. We submit that this privilege should be limited to one person as otherwise a party could deem a number of people to be their representative over the course of a claim in order to get privilege. Privilege over the communications should only exist for as long as the person is acting as their representative and a party should only be able to have one representative at once to mitigate "privilege shopping".

Recommendations:

- **That as a minimum, the possible fine under clause 62(2) be increased from $2,000 to $10,000; and**
- **That Parliament consider including a requirement for all advocates, including lawyers, to register with the Tribunal, and enable deregistration for instances of misconduct; and**
- **That clause 3(2) be amended so that privilege is limited to one person and only exists for as long as that person is acting as a party's representative.**

22. Schedule 2 Clause 19 – Witness summons and production of things in evidence

22.1 Clause 19 of Schedule 2 allows the Tribunal to issue a summons to a person requiring that the person attend the hearing and give evidence (including to produce books, papers, documents or records). Failure to comply is an offence under clause 62(1)(e). These are broad powers and it is not clear what, if any, right to appeal an order there would be. Our concern is that the Tribunal might order the production of information from a party which that party believes is privileged or irrelevant. We submit that the Bill should include the ability for parties to appeal to the High Court on questions of law in respect of the Tribunal's orders.

Recommendation:

- **That the Bill include the ability for parties to appeal to the High Court on questions of law in respect of the Tribunal's orders.**

23. Schedule 2 Clause 22 – Annual report to Minister on performance of tribunal's functions

23.1 We support the publishing of annual reports, however would suggest that clause 22(3) also include the number of cases that were transferred to and from the courts during the year, and more detail around the claims that were settled via the Tribunal process. For example, the

number of claims that were settled where a defendant was ordered to pay any amount less that what was claimed.

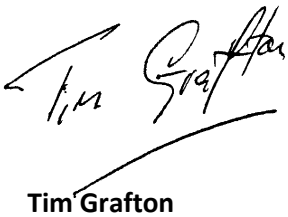
Recommendation:

- **That clause 22(3) require annual reports to include the number of cases that were transferred to and from the courts during the year, and more detail around the claims that were settled.**

Conclusion

Thank you again for the opportunity to submit on the Canterbury Earthquakes Insurance Tribunal Bill. If you have any questions, please contact our Legal Counsel on (04) 495 8008 or by emailing jane@icnz.org.nz.

Yours sincerely,



Tim Grafton
Chief Executive

Jane Brown
Legal Counsel