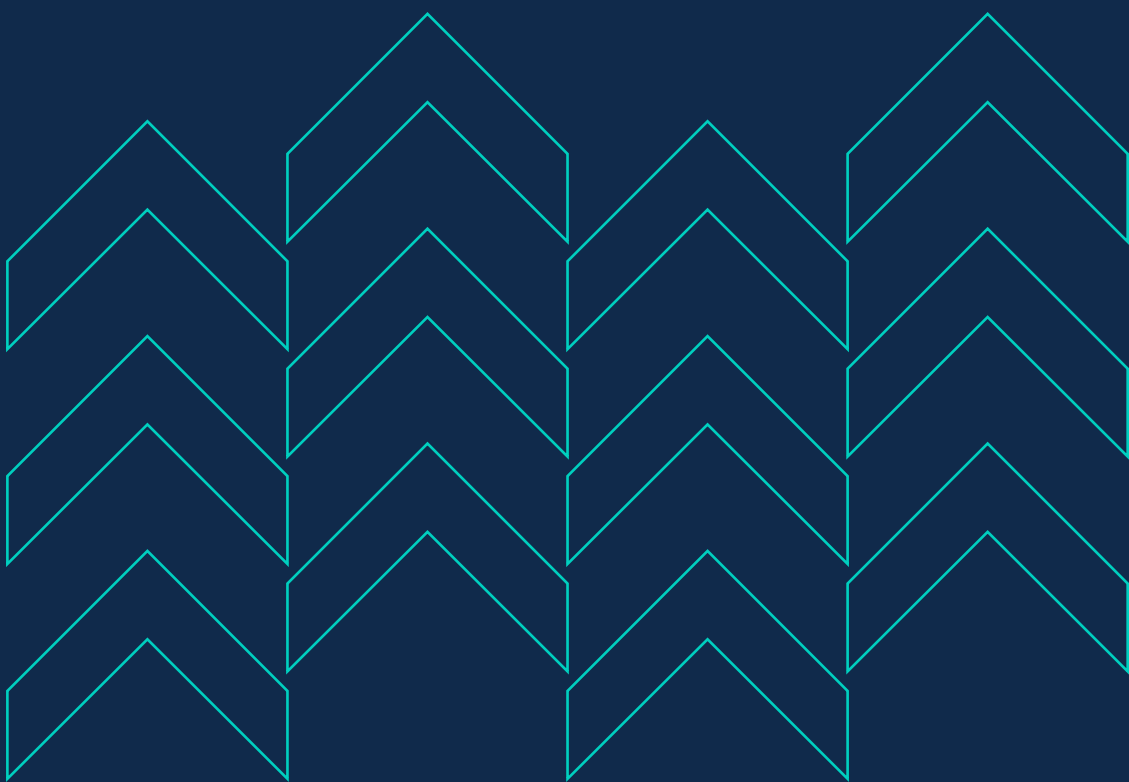
Tribunals and Post-Disaster Dispute Resolution:
A Canterbury Case Study

Dr Toni Collins
Dr W. John Hopkins
Natalie Baird
Jill Banwell

1 December 2024
HREC Ref 2023/97/LR-PS

FUNDED BY
Natural Hazards Commission
Toka Tū Ake



CONTENTS

EXECUTIVE SUMMARY

This Report is in four main parts. The first examines Aotearoa New Zealand's dispute resolution system in the context of the Canterbury Earthquake Sequence (CES). This event saw a huge growth in the number of disputes which threatened to overwhelm the existing system. One initiative in response was the establishment of the Canterbury Earthquakes Insurance Tribunal (CEIT). The second part provides an examination of the jurisdiction, practice and processes of this Tribunal. The third part provides a critical assessment of the CEIT's operation, drawing on the findings of a series of semi-structured interviews with those who appeared before the Tribunal, worked as employees within it or otherwise engaged with the CEIT and the wider dispute resolution system in the post-CES environment. The fourth and final part draws upon the project's research findings to propose a series of recommendations for consideration in the construction of future dispute resolution mechanisms in post-disaster environments and the role of tribunals within them. A summary of these findings and the recommendations is given below:

Principal Research Findings

The Canterbury Earthquakes Insurance Tribunal was established at a time when existing legal avenues for post-disaster dispute resolution were not providing the speedy, informal and cost-effective processes needed to assist thousands of claimants. Thus, the establishment of the CEIT to ease the workload of the Courts, provide an alternative pathway for dispute resolution and a process that was more flexible, less formal, speedy and more cost-effective than the courts and could be used as a "threat" to assist parties to achieve settlements could be regarded as a success. In this way the CEIT can be considered as meeting its aims.

However, this report makes clear that stakeholder perceptions of the CEIT were that its operations and processes could be improved. The expectation that the Tribunal would provide a model for post-disaster dispute resolution that would solve the problems that plagued the court process was not fully achieved for the following reasons:

1. There was a lack of legal preparedness for post-disaster dispute resolution.
2. The creation of a Tribunal in the recovery period of the Canterbury Earthquake Sequence without pre-planning and consultation with users rather than prior to the disaster was not best practice and led to a sub-optimal system.
3. In its first years of operation when it handled the majority of the disputes, the Tribunal did not provide sufficient access to justice. At times it suffered from similar issues to the court system including delays and thus associated expense for participants.
4. The dominance of lawyers in the Tribunal led to a use of adversarial processes. This is turn led to similar practices being employed as in the formal courts and led to delays within the system.

A number of these issues were addressed in changes made to the CEIT in 2022.[1] However these changes took place three years after the Tribunal's establishment and after a significant number of cases had been concluded. In addition, a number of issues remained. The report concludes that pre-planning in advance of the earthquakes for a Tribunal or similar dispute resolution entity could have avoided the issues that arose in the early days of the CEIT as well as issues which have remained live throughout the CEIT's lifepan.

1 Annual Report of the Canterbury Earthquakes Insurance Tribunal (for the 12 months ended 30 June 2022).

Principal Recommendations

Legal preparedness for disasters is essential. A sudden and voluminous number of insurance claims and disputes after a disaster is foreseeable and therefore preparation for this ahead of time can be achieved. While it is clear the CEIT had a positive impact upon the system as a whole, it was an imperfect model for post-disaster dispute resolution. The CEIT learned from its early experiences and consequently made changes to its practice three years after its establishment.

It is the view of the research team that any future post-disaster dispute resolution system should, from the outset, include an adjudicatory tribunal of some form providing a clear alternative to the court system. This tribunal should also incorporate mediation and case management services. The research team suggests that the following key features should be part of any such scheme:

1. The tribunal should be established by statute and compel insurers to participate.
2. The processes of the tribunal must be claimant-centred, and consideration should be given to reducing legal representation.
3. The processes of the tribunal must address the power imbalance between the parties and be flexible enough to adapt to the specific needs of the claimant.
4. The tribunal should publish decisions to provide transparency and consistency in decision making.

1. INTRODUCTION

Aotearoa New Zealand's vulnerability to natural hazards is well established. Owing to its geology and geographical situation in the South Pacific, seismic, volcanic and meteorological hazards are all common. The existence of hazards, in itself, does not create a disaster. Rather, as is commonly understood in Disaster Risk Reduction studies and practice, it is the management of these hazards by communities that are exposed to them that creates the vulnerability and, thus, disaster risk. To use the provocative suggestion of Ilan Kelman, communities "choose" to experience disasters by the decisions they make.[2] However, although the social nature of disasters is now well understood, the role that legal systems play in this vulnerability is less well explored. This research gap is a global one, but it is particularly noticeable in Aotearoa, where post-disaster legal analysis remains limited.[3]

This report aims to address this gap in a very specific area, that of post-disaster dispute resolution in the field of insurance. For reasons which are explored below, insurance plays a major role in the recovery process in Aotearoa New Zealand, and the resolution of insurance disputes was a significant issue in the wake of the Canterbury Earthquake Sequence (CES). As a result, a specialist dispute resolution body was established in 2019 (the Canterbury Earthquakes Insurance Tribunal) to expedite the processing of these claims. The operation of this Tribunal is the focus of this work.

New Zealand has a high level of insurance coverage for residential dwellings,[4] with only a small number of homeowners who, for various reasons, do not hold insurance.[5] Insurance for natural hazards is primarily achieved through a mandated national scheme which requires that a levy is paid to the Natural Hazards Commission | Toka Tū Ake (formerly the Earthquake Commission or EQC).[6] This Crown entity provides a primary level of insurance cover in the wake of most natural hazards.[7] Private insurance companies cover anything in excess of this amount, in line with the terms of the individual contract. When a disaster occurs and impacts a major asset like a house, the insurance policy and the interpretation of its contractual terms, are not always straightforward. This often leads to disputes between the insured and insurer which ideally should be resolved quickly through an efficient and effective dispute resolution system to allow those impacted to "move on" with their lives, and for the recovery to progress efficiently. This did not occur in the wake of the CES, with disputes taking years to resolve often at significant financial and emotional cost to those affected. The failure of the dispute resolution system thus caused a secondary "disaster".

At the time, the CES was the costliest disaster in the history of Aotearoa New Zealand. In addition to the personal tragedy caused by 185 deaths and over 5,000 significant injuries, the cost of the event has been estimated to be around $40 billion. Much of this cost was born by the insurance sector, as the event produced thousands of insurance claims for damaged and destroyed homes and buildings.[8] Many of these claims were contested, and as a result, Aotearoa New Zealand's dispute resolution system was seriously challenged.[9] Unfortunately, as explored below, the

2 Kelman, I *Disaster by Choice: How Our Actions Turn Natural Hazards into Catastrophes* (OUP, 2022).
3 Jeremy Finn and Elizabeth Toomey *Legal Response to Natural Disasters* (Thomson Reuters, Wellington, 2015) at 2.
4 The Treasury *Emerging Insurance Challenges* (Report No: T2023/1934, 20 March 2024) at 7, stating that the Household Economic Survey of owner-occupiers of main dwellings reports 84 per cent insurance coverage, and the Insurance Council of New Zealand survey reports 95 per cent.
5 These people are those who cannot afford to insure or who choose to self-insure.
6 Name was changed on 1 July 2024 under the Natural Hazards Insurance Act 2023.
7 At the time of the Canterbury earthquake sequence, this was defined by the Earthquake Commission Act 1993, Part II. This has now been replaced by the Natural Hazards Insurance Act 2023. Part II again defines the scope of natural hazard cover. Although the 2023 Act introduces some changes to the cover provided by the NHC, this detail is beyond the scope of this research project.
8 The Chief Executive of EQC said that EQC had 469,000 claims for earthquake-related damage: Wei Shao "13 years post- quake, hundreds of Cantabrians still entangled in claims" *The Press*, 22 February 2024.
9 T Collins and J Hopkins "Post-Disaster Dispute Resolution: A New Zealand Case Study" (2022) International Handbook of Disaster Research (4 August 2022 online).

system was completely overwhelmed and for many, efficient and timely resolution of disputes did not occur.[10] A lack of options outside the formal courts in particular created significant cost and delay. The consequences of this for individuals and the community were serious. People endured living in damaged homes for years, while dealing with significant financial problems and, in many cases, associated health and wellbeing issues. As is common in post-disaster recovery, some of the most vulnerable members of the community were disproportionately affected.[11]

That the business-as-usual system for dispute resolution failed in the extreme conditions experienced after the CES is not surprising. Delay and cost are an enduring problem within Aotearoa New Zealand's judicial system in normal times as confirmed by most participants in the study, reflected in this comment from one: "The problem with all of the traditional systems [for dispute resolution] is that they cannot deal with the problem of time and cost".[12] However, these problems are exacerbated in a post-disaster setting as, when the number of disputes rises, time is of the essence and the individuals involved have other financial and personal pressures.

Although the problems with the business-as-usual system became clear very early in the process, the government was slow to act. In 2013, the lack of appropriate advice for owners of earthquake-damaged properties led to calls for the establishment of a state-funded service. This resulted in the establishment of the Residential Advisory Service (RAS),[13] which in 2018 was incorporated into an "integrated service model", through the Greater Christchurch Claims Resolution Service (GCCRS). These changes were part of a package of reforms introduced in response to the 2018 *Report of the Independent Ministerial Advisor to the Minister Responsible for EQC*, which also included the establishment of the Canterbury Earthquakes Insurance Tribunal (CEIT).

These reactive reforms were introduced to address the significant problems that had arisen because of the unprecedented number of disputes arising from the CES. However, these disputes were not unexpected, and the failure to plan for them led directly to problematic outcomes for individuals and the wider community. Large, experienced and deep-pocketed insurance companies faced individuals (and groups) with little experience of dispute resolution, limited financial resources and significant personal challenges. This imbalance between parties has long been recognised as a fundamental problem within Western legal systems, and the CES merely exacerbated the imbalance between litigation "repeat players" (the insurance companies) and "one shotters" (individual homeowners).[14] The situation was made worse by the fact that many affected individuals were forced to engage in further conflict with their insurers as a result of defective repairs. The strain of participating in dispute resolution processes often left individuals and families suffering from significant stress affecting both their physical and mental health. Thirteen years on from the Canterbury earthquakes, many disputes relating to the disaster remain unresolved. If nothing else, this is clear evidence that the current dispute resolution system, dominated by the courts initially, latterly involving the GCCRS and the CEIT (in different capacities), failed to deliver the swift, effective and fair results that the recovery required.

This report focuses in particular upon the operation of the CEIT as a means of delivering specialist dispute resolution in the wake of the CES and the lessons that can be learned from it. Tribunals are a feature of the legal system in Aotearoa New Zealand. They have long been used to provide an informal, quick, and inexpensive means of dispute resolution.

10 Freya McKechnie "Dispute resolution following natural disasters" (Summer Research Scholarship Programme for GCDR & MBIE, Victoria University, April 2018).

11 Canterbury Earthquake Recovery Authority, Wellbeing Survey 2012 Report (Nielsen, Ref No: NZ200343, October 2012) at 14 states 54% of those surveyed were more likely to say their quality of life had decreased since the earthquakes and they include those living in temporary housing (70%), of Māori ethnicity (68%) aged 35-49 (60%) or 50-64 (62%).

12 Participant 9.

13 RAS was established by CERA, the Christchurch City Council, Toka Tū Ake EQC and Insurance Council of NZ.

14 Galanter, Marc "Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change" (1974) 9(1) Law & Society Review 95.

They are not without controversy in the New Zealand context, where they are somewhat ad hoc in nature and lack an overall legal framework, which has led to consistent calls for reform.[15] Despite these criticisms, tribunals continue to be created with the intention of providing low-cost and speedy alternatives to courts when an issue creates multiple disputes in a specialised area. It was for these reasons that, in 2019, the government established the CEIT to provide an option for homeowners to resolve earthquake-related insurance disputes outside the formal court system.

As this report makes clear, the CEIT performed, and continues to perform, a useful role. However, its effectiveness fell short of expectations. To some extent, this was due to its introduction in the later stages of the recovery process. However, the report also identifies problems around the over-judicialisation of the model, problems around expert evidence, and the gaming of the system by repeat players (among other things). These shortcomings are explored more fully below. Given that Aotearoa New Zealand is again facing significant pressures upon dispute resolution mechanisms after the North Island weather events of 2023, and there are moves towards reforms in relation to post-disaster insurance disputes, it is important that the lessons of the CEIT are understood. This will not only allow for such lessons to be applied in future post-disaster dispute resolution models in Aotearoa New Zealand but also globally, where similar problems have been identified due to the increasing financial cost of disasters caused by natural hazards. We hope that the following report provides the basis for this understanding.

(a) Methodology

This project has explored the role of the CEIT as a specialist tribunal as a model for post-disaster dispute resolution. The research uses doctrinal and socio-legal methodology. As well as reviewing the legal documentation, this involves examining the operation of legal frameworks in practice and operates from the premise that the law is a reflection of the operation of such legal rules in practice (that is, the law is defined by its function, not its form).

The research was undertaken in four phases:

1. A desktop review of the use of dispute resolution after the CES (including its development);
2. A desktop review of the CEIT and its operation;
3. Semi-structured interviews with key participants familiar with the CEIT and relevant stakeholders;
4. An analysis of the CEIT's effectiveness in the light of its aims.

Phase one developed an understanding of the CEIT in the context of the post-CES dispute resolution "system" and the evolution of this system. A desktop study was undertaken to provide this context through a review of publicly available information and media reports. This information was used to produce a timeline of how post-disaster dispute resolution processes developed over the 13 years since the CES began. This first stage was essential for understanding the interplay between the various dispute resolution entities utilised after the CES, and the context in which the CEIT was introduced and operated. This first phase was complemented by a further desktop study of existing literature, statutory frameworks, case law and other relevant material. This was collated to provide a base line of existing knowledge around the CEIT and its processes.

On the basis of this initial background research, the team undertook a series of 23 semi-structured interviews with a range of participants to gain a view of the Tribunal's operations in practice. The interviewees included participants

15 See for example, the NZ Law Commission's *Unified Tribunal Framework* project (2006-2008): https://www.lawcom.govt.nz/our-work/unified-tribunal-framework/;

from the following categories:

- those experienced in the operations of the Tribunal;
- those who had represented homeowners;
- those who had represented insurers;
- those experienced in the operations of the GCCRS;
- insurance industry representatives;
- engineers;
- political representatives; and
- other stakeholders with experience of the Tribunal.

All of the interviewees are confidential so they could provide full and frank views.

Insurers, as financial service providers, must belong to one of two external dispute resolution schemes which together we have termed the "financial services dispute resolution system" (FSDRS). They are an Ombudsman service providing mediation and adjudication (in the form of an assessment) services to assist in the resolution of disputes for claimants. The two entities under the FSDRS that provide these services were not approached for their views on the Tribunal as it was outside the scope of this report. However, some observations from the participants have been noted about the role of the Ombudsman in post-disaster dispute resolution and this may be something worth exploring in future work.

After obtaining ethics approval from the University of Canterbury's Human Research Ethics Committee, the interviews were undertaken over a period of seven months.[16] Anonymised transcripts were reviewed and thematically coded by the project team to draw out common views of participants. The transcripts will be retained for seven years and securely stored by the project team in accordance with the University of Canterbury's data policies.

The team notes that residential property owners who utilised the CEIT are key stakeholders in the dispute resolution process, but this group was excluded from the interview process. The project explicitly excluded this class due to ethical concerns around interviewing such a vulnerable group, the pressures of time in setting up the requirements to do so and the strict requirements of the human ethics approval process at the University of Canterbury. However, the team were approached during the progress of the research by some residential property owners who wished to share their views. Gaining greater insights into this group should, in the views of the research team, be the focus of a future, complementary, project.

The results of our analysis have been contextualised within the wider dispute resolution model used in the CES, and assessed against the aims of the CEIT.

(b) Contextualising the CEIT

(i) Rights-based approach

At its heart, the purpose of the CEIT was to enable residential property owners to resolve their insurance disputes to fix their homes. Although its statutory purpose was not framed in human rights terms, two core human rights are part of the wider context for assessing its effectiveness.

16 HREC Ref 2023/97/LR-PS.

The first human right of significance to the operation of the CEIT is the right to adequate housing. The right to housing is more than simply a place to shelter; it implies the right "to live somewhere in security, peace and dignity".[17] As noted by the New Zealand Productivity Commission: "There are few things more important to New Zealanders than the homes we live in. Housing is a fundamental determinant of wellbeing, central to health, family stability, and social cohesion".[18] It can be understood as part of the inherent human right to dignity, and it was severely impacted by the CES, and the subsequent aftermath.

The right to housing falls under the broad umbrella of the right to an adequate standard of living. Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that: "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions." Although the ICESCR was ratified by New Zealand in 1978, and so is a binding legal obligation, New Zealand's protections for economic, social and cultural (ESC) rights are relatively weak. New Zealand's approach to ESC rights is to treat them as matters of policy rather than legally enforceable rights. For example, the New Zealand Bill of Rights Act 1990 protects only civil and political rights, but not ESC rights like the right to housing. This approach has negatively impacted the visibility of ESC rights like the right to housing. However, because the right to housing was so severely impacted by the CES and its aftermath, it became visible in the response and recovery phases, with many calls for the right to housing to be better protected – for residential property owners, tenants and those who were homeless.[19] Although not reflected in its empowering legislation, the establishment of the CEIT was, in essence, an initiative aimed at better protecting the right to housing for residential property owners.

The second especially relevant right to the operation of the CEIT is the right to an effective remedy. Put simply, a human rights-based approach requires that there be effective remedies for human rights violations. This means that if the right to adequate housing is breached, there should be an effective remedy. However, partly because of New Zealand's weak human rights framework for ESC rights such as the right to adequate housing, there was a lack of effective remedies for individuals whose right to housing was breached in the aftermath of the CES.[20] Proceedings under the Human Rights Act 1993 are only available in cases of discrimination on one of the 13 prohibited grounds. In addition, obligations to respect, protect and fulfil human rights are typically seen as falling on the Government rather than private actors like insurance companies. However, it is increasingly recognised that businesses have significant impact on human rights and should take action to mitigate those impacts. As noted by the Human Rights Commission in the aftermath of the CES: "The significance of the insurance model having such a large bearing on recovery cannot be underestimated."[21]

In the absence of rights-specific remedies after the CES, residential property owners tried other remedies, such as the IFSO and the High Court (discussed below), in order to achieve the human rights outcome of remedying breaches of their right to adequate housing. However, as detailed further in this report, these remedies were, for various reasons, ineffective. It was this lack of effective remedies via existing legal avenues that eventually led to the establishment of the CEIT in 2019. Thus, the CEIT can be regarded as an attempt to provide an effective remedy for residential property owners to realise their right to housing.

17 Committee on Economic, Social and Cultural Rights *General Comment No 4: The Right to Adequate Housing* E/1992/23 (1991) at [7].
18 New Zealand Productivity Commission *Housing Affordability Inquiry* (April 2012) at iii.
19 See generally, Human Rights Commission *Monitoring Human Rights in the Canterbury Earthquake Recovery* (December 2013) at 41–103; Natalie Baird "Housing in Post-Quake Canterbury: Human Rights Fault Lines" (2017) 15 NZJPIL 195.
20 See Natalie Baird "Housing in Post-Quake Canterbury: Human Rights Fault Lines" (2017) 15 NZJPIL 195 at 226–227.
21 Human Rights Commission *Monitoring Human Rights in the Canterbury Earthquake Recovery* (December 2013) at 138.

(ii) Tribunals in Aotearoa New Zealand

It is useful to contextualise the CEIT as part of Aotearoa New Zealand's overall tribunal system. A court system similar to that used in England and Wales has been the primary state sponsored method of dispute resolution in Aotearoa New Zealand since the signing of the Treaty of Waitangi in 1840, and the establishment of the first colonial court in 1841. This system developed gradually in England over several centuries as a model based on a willingness to utilise case law from other "Common Law" jurisdictions. In the nearly 200 years since this system was established, the structure of the New Zealand court system has changed dramatically, but the essence of this model remains the same.

One feature of the English model is its acceptance of "alternative" dispute resolution systems alongside the formal court structure. In New Zealand, as in the United Kingdom, these "specialist" models are commonly described as tribunals. Sitting outside the formal court structure, tribunals have been established as a means of addressing disputes through procedures that are more suited to the disputes being decided. One of their proclaimed advantages is that they provide a quick, inexpensive and informal adjudicatory model, particularly when disputes utilising similar legal rules (often in large numbers) are to be expected.

Today there are many tribunals in Aotearoa New Zealand.[22] Probably the most well-known is the Disputes Tribunal (originally the Small Claims Tribunal), established in 1977, but this is something of an outlier. This provides an adjudicatory service for smaller monetary claims across a wider range of subject matter. In contrast, most Tribunals are designed to provide a specialised service for specific types of disputes. Although there is no hard and fast rule, specialist tribunals are seen as more appropriate than generalist courts when the issues under dispute are similar (and often voluminous), technically complex, isolated from other elements of the legal system and more factual than legal. In these circumstances, the expense and formality of the common law legal system is seen as unnecessary. Tribunals thus provide a way to deliver dispute resolution free from the confines of the adversarial formality of the courts. Importantly, each tribunal is established through specific legislation, which also sets out its powers, functions and the extent of its authority or jurisdiction. Examples which follow this model include the Tenancy Tribunal, the Weathertight Homes Tribunal and the Motor Vehicle Disputes Tribunal, amongst many others. However, one feature of the New Zealand model is that, despite the popularity of tribunals as a model for specialist, more informal justice, there exists no overarching legislative or administrative framework to manage them. Instead, the tribunal "system" exists as a series of separate entities governed by individual Acts (many of which refer to each other) and 23 of which (including the CEIT) are managed by the Tribunals Unit within the Ministry of Justice. This situation is generally regarded as unsatisfactory, but despite many attempts (by various governments) to introduce a degree of coherence into this "system", it has remained somewhat ad hoc.[23]

Despite the ad hoc nature of New Zealand tribunals, many features can be identified as common to most if not all tribunals. Tribunals commonly use fewer formal procedures particularly around rules of evidence (a key source of complexity in the court system), and charge lower fees. This, plus the speed of decision making (including the lack of interlocutory procedures which can delay proceedings) and the lack of a need for costly legal representation (in some cases) means that tribunals can provide individuals and smaller organisations with a means to resolve disputes that might otherwise not be open to them. In addition, many tribunals encourage alternative dispute resolution methods like mediation or negotiation to facilitate timely outcomes which also reduces cost. Finally, limited avenues

22 Gibbons T and Duggal M (ed) *New Zealand Tribunals Law and Practice* (Thomson Reuters, Wellington 2020).

23 See Hopkins WJ, "Order from Chaos? Tribunal Reform in New Zealand" (2009) 2 Journal of the Australasian Law Teacher's Association 47; Law Commission "Unified Tribunal Framework Project" http://www.lawcom.govt.nz/project/unified-tribunal-framework.

of appeal from tribunal decisions means that parties can achieve swift resolution without the threat of costly and time-consuming appeals (and the costs that these can incur).

The New Zealand court system and the tribunal system thus offer distinct avenues for resolving legal disputes, each with their own procedural framework and jurisdiction.[24] The formal court system operates within a hierarchical, procedurally-focused model designed for disputes of public import. Conversely, tribunals typically operate in specific areas of law, providing a more accessible and informal alternative for resolving disputes. Tribunals often employ specialist adjudicators or commissioners with expertise in relevant fields, offering a quicker, less expensive and more appropriate resolution processes. While courts focus on upholding legal principles and precedent, tribunals can prioritise fairness and efficiency, catering to the diverse needs of New Zealand's legal landscape. In particular, an advantage of tribunals is their ability to offer practical access to justice for individuals in the wider context of a court system which is inaccessible to most.

The specialised features of tribunals would therefore appear to make tribunals an ideal dispute resolution mechanism for post-disaster situations where an unusually large number of legal claims will arise simultaneously. However, as this report makes clear, the operation of the CEIT within the wider dispute resolution system was not without issue.

2. THE CANTERBURY EARTHQUAKE SEQUENCE

The Canterbury earthquake sequence (CES) of 2010 and 2011 began with a magnitude 7.1 earthquake on 4 September 2010, centred near the small rural town of Darfield, west of Christchurch. This event caused widespread damage to infrastructure and buildings, as well as around 1,500 injuries and two fatalities. Large aftershocks plagued the region for several months, but the most devastating occurred on 22 February 2011. The magnitude 6.3 earthquake was centred close to the central business district of Christchurch and claimed the lives of 185 people, while causing around 5,000 injuries. It caused extensive destruction and damage to infrastructure, commercial, and residential buildings, with thousands of buildings being rendered unsafe for use or habitation.

(a) Claims and Disputes

The CES generated a multitude of insurance claims covering various types of loss and damage. Property damage claims were widespread, encompassing residential homes, commercial buildings, and infrastructure. Structural damage, including cracked foundations, collapsed walls and compromised roofs, constituted a significant portion of these claims. Additionally, contents insurance claims emerged for the loss or damage of personal belongings and business assets. Business interruption claims were prevalent, as many enterprises were forced to cease operations due to building damage or infrastructure disruptions. Moreover, there were claims related to additional living expenses incurred by individuals displaced from their homes. Insurance companies also received claims for land damage, particularly regarding land subsidence or liquefaction caused by the seismic activity. The complexity and scale of insurance claims arising from the CES was a challenge for which insurers, local bodies and the government were unprepared. This problem could have been foreseen, but it is clear few turned their minds to the question of how to deal with the volume of claims arising from a large-scale event and the complexity of the issues that arose.

24 Gibbons and Duggal, above n 22.

The court system in Aotearoa New Zealand was already under strain prior to the CES, with significant delays being reported.[25] It was therefore no surprise that the inundation of claims which occurred in the wake of the CES swiftly led to a crisis within the court system. The options for dispute resolution for insurance claims after the CES were limited. As many claims exceeded the jurisdictional limits of the FSDRS, the Disputes Tribunal, and the District Court, the majority were channelled into the High Court. This made dispute resolution expensive and extremely slow through a court that was already experiencing workload pressure and delays.

The High Court was unprepared for the consequences of a disaster event of this scale. Not only did it face an unprecedented number of earthquake-related insurance cases, it had its usual workload in addition to navigating its own post-disaster problems, including finding alternative premises after its buildings were damaged.[26] The High Court nevertheless responded reasonably quickly to the influx of claims by establishing the Christchurch High Court Earthquake List ("Earthquake List") in May 2012. This was a case management system run by senior Judges that tried to manage and fast track earthquake-related claims. It was a unique system that had not been trialled before but worked reasonably well to identify and collect together earthquake-related cases with a view to expediting them while allowing the Court to continue with its existing workload.

(b) A Timeline of Developments in Dispute Resolution 2012–2019

Despite the best efforts of the Courts using the Earthquake List to manage the influx of cases, huge delays in hearings ensued. For claimants trying to resolve their insurance claims and move on with their lives, these delays caused enormous uncertainty, cost and stress.

In response, an independent specialist facility, the Residential Advisory Service (RAS), was established in May 2013 for property owners of earthquake-damaged homes, offering a free advisory service to assist claimants to manage their claims. Established by a partnership between insurance companies, EQC, CERA and the Christchurch City Council, the RAS provided free independent legal and technical assistance, second-opinion advice from its panel of technical experts and a brokering service between claimants and insurers. In 2015, the Ministry of Business, Innovation and Employment took over the funding of the service. In 2017, the RAS became part of the Greater Christchurch Claims Resolution Service (discussed below).

In 2017, the Labour Party made a promise that, if elected in the September General Election, it would establish an Insurance Tribunal to provide an alternative pathway for claimants to resolve insurance disputes. In August 2017, the Insurance Council of New Zealand (ICNZ) came out strongly against this proposal. In a media statement, it said that any tribunal would be set up "against" the wishes of insurers and that it was a "misconceived, poorly thought-through seat-of-the-pants policy that runs roughshod over natural justice".[27] ICNZ noted that insurers helped establish and fund RAS to help homeowners navigate their claims and had subsequently, in response to public demand, also waived its right to close off claims under the Limitation Act 2010 so people had more time to settle their claims.[28] The

25 Auditor General *Ministry of Justice: Supporting the management of court workloads* (December 2009); https://oag.parliament.nz/2009/court-workloads/docs/oag-court-workloads.pdf. The pressures on the Dispute Resolution system continue today see Office of the Chief Justice "Annual Report for period 1 January 2023 to 31 December 2023" (Published 20 August 2024) available at www.courtsofnz.govt.nz

26 Finn and Toomey, above n 3, at 65–66, reported the frustration felt by the profession at the delays experienced in the operation of the court system post-disaster.

27 Insurance Council of New Zealand "Insurance Council Rejects Labour's Christchurch Earthquake Arbitration Tribunal" (Media Release, 28 August 2017) https://www.icnz.org.nz/industry/media-releases/insurance-council-rejects-labours-christchurch-earthquake-arbitration-tribunal/

28 Insurance Council of New Zealand "Insurance Council Rejects Labour's Christchurch Earthquake Arbitration Tribunal" Media Release, 28 August 2017) https://www.icnz.org.nz/industry/media-releases/insurance-council-rejects-labours-christchurch-earthquake-arbitration-tribunal/

CEO of ICNZ argued against the establishment of a specialist tribunal on the basis there was already a free system available to homeowners to assist with their property claims (referring to RAS) and that the appropriate place for disputes was the courts. He said the tribunal would be an "inquisition over insurers", questioned the way decisions would be made and whether they could be appealed.[29] He also expressed concern at the time requirements and the potential for the tribunal to be able to re-open full and final settlements and penalise insurers for undue delays. His view was that insurers had been at pains to settle claims in Canterbury as quickly as possible, with over 95 per cent of all residential claims having been settled at that time. He did not feel a tribunal of the type proposed was suitable for the task. At the time of the interview, ICNZ appeared to be of the view that all claims would be settled by 2018, before the tribunal would be in operation and thus the tribunal would be unnecessary.[30]

At the beginning of 2018, with the exception of the advisory services provided by RAS and the High Court's Earthquake List, the dispute resolution processes available to claimants were largely unchanged and, as a result, public frustration mounted. In January 2018, Empowered Christchurch wrote an open letter to the Minister of Justice, Hon Andrew Little, outlining concerns with the lack of progress and problems with cases dealt with under the High Court Earthquake List.[31] It claimed the High Court was "over-burdened, under-resourced and prohibitively expensive".[32]

In February 2018, the Minister for Earthquake Commission and Greater Christchurch Regeneration, Hon Megan Woods, appointed an independent ministerial advisor to work with EQC and report on operational changes that might assist in speeding up the resolution of claims. At the time EQC had over 3,000 re-opened claims with 300–500 more being re-opened each month.[33] The executive summary noted that:[34]

> Settlement of claims is running at a similar monthly pace but many claimants are still not able to draw a line under these events. Moreover, too many are faced with the prospect of lengthy, costly and stressful court proceedings to resolve their issues.

In July 2018, the Christchurch City Council (the Council) made a submission to MBIE on a review of insurance contract law in New Zealand.[35] The submission advised on the role of and need for RAS and outlined the Council's involvement with, and reasons for, funding the service. The submission recorded that since its launch, RAS had received 17,870 contacts from residential property owners to the end of business on 20 April 2018. Of those contacts received, 5,314 had been progressed to a meeting with an independent advisor or broker.[36]

In 2018, a memorandum to Cabinet from the Minister for Justice noted that of over 167,677 residential property claims, 2 per cent remained unresolved.[37] Many of these were highly complex and there was no clear pathway to settlement. There were also claims being re-visited owing to the discovery of additional earthquake damage or deficient repairs.

29 Ibid.
30 Ibid.
31 Open Letter from Empowered Christchurch to Justice Minister, Andrew Little (9 January 2018) https://christchurch.scoop.co.nz/?p=40642; "Open letter to Justice Minister Andrew Little to fix 'failed' quake court" Stuff (11 January 2018) http://www.stuff.co.nz/national/100463621/open-letter-to-justice-minister-andrew-little-to-fix-failed-quake-court?rm=m.
32 Ibid.
33 Independent Ministerial Advisor's Report, reported in Department of Prime Minister and Cabinet "Inquiry into the Earthquake Commission Proactive Release" (January 2019) https://www.dpmc.govt.nz/sites/default/files/2019-01/cabinet-paper-canterbury-insurance-next-steps-dev-18-sub-0150.pdf. It is likely the claims were re-opened because the original scope of works or the work undertaken was inadequate to meet the legislative requirements.
34 Ibid.
35 Lianne Dalziel (Mayor of Christchurch City Council) "Christchurch City Council submission on the Insurance Contract Law Review" (13 July 2018) https://www.mbie.govt.nz/dmsdocument/5232-christchurch-city-council-submission-insurance-contract-law-review-pdf.
36 Statistics taken from the RAS Monthly Report (April 2018).
37 Ministry of Justice Regulatory Impact Assessment: Canterbury Earthquakes Insurance Tribunal (Regulatory Impact Statement, 3 August 2018).

The memorandum also set out the numbers and types of disputes, including reference to 512 active cases in the High Court (on the Earthquake List) and 67 in the District Court. As well as issues of wellbeing for those impacted, the ongoing claims and disputes were seen as potentially undermining confidence in the legal and insurance systems' ability to deliver effective resolution in a timely manner. To address this, the Minister of Justice proposed an easily accessible tribunal that would apply existing law and precedent but, as a specialist body, would be able to develop expertise in managing earthquake-related insurance disputes. It was to take an active and inquisitorial approach to cases, focusing on finding a pathway to resolution for homeowners. It would have the power to appoint independent expert advisers. In addition, the new service was to include an independently funded mediation process.

The new government subsequently introduced two parallel reforms to address the problems of delayed dispute resolution in the wake of the CES. In October 2018, the Minister for Greater Christchurch Regeneration, Hon Megan Woods, announced the establishment of the Greater Christchurch Claims Resolution Service (GCCRS) to be hosted and operated by MBIE. This service was built on RAS and was extended to include dispute resolution services, in the form of mediation and arbitration. In July 2018, the Minister of Justice sought Cabinet's approval for introduction of the Canterbury Earthquakes Insurance Tribunal Bill.[38] The tribunal was to be an independent judicial process to progress the resolution of claims. It was intended to be a "circuit breaker", providing speedy, flexible and cost-effective procedures to assist people with outstanding claims. The scope of the tribunal's jurisdiction was intended to assist with obtaining closure for homeowners but also to ensure that highly legal and complex matters remained with the courts.[39] The Minister proposed that the tribunal would be "homeowner oriented", providing an alternative pathway for the policyholder not the insurer or EQC. This was justified on the grounds that other parties (insurers and EQC) had easier access to the courts. Therefore, it was proposed that:[40]

(a) The tribunal be a policy-holder initiated process only;

(b) Claims already lodged with the court could be moved to the tribunal by the policy-holder or Judge if seen to be in the interests of justice;

(c) If the insurer or EQC had filed with the court, the policy-holder (with the agreement of the Judge) could transfer proceedings to the tribunal;

(d) Claims could still be filed in Court by any party.

(e) The tribunal could not be used to decide claims about on-sold properties as these involved highly complex legal issues which should be dealt with by a Court.

(f) The tribunal would not replace RAS or other agencies or entities assisting people with claims.

Importantly the Draft Bill specified that processes in the tribunal were to be flexible, accessible and would enable or provide:[41]

38 Office of Minister of Justice and Minister for Courts "Canterbury Earthquakes Insurance Tribunal Bill: Approval for Introduction" (19 July 2018).
39 Ibid.
40 Office of the Minister of Justice and Minster for Courts "Canterbury Earthquakes Insurance Tribunal Bill: Approval for Introduction" (19 July 2018).
41 Ibid.

(a) a proactive approach to case management allowing case management conferences, setting of timeframes and convening a conference of experts;

(b) the ability for the tribunal to direct parties to fully funded mediation intended to narrow issues or resolve claim;

(c) the ability for the tribunal to appoint independent advisors with technical aspects of claim; and

(d) awards of costs (due to undue delay, for example).

There would be no fees for accessing the tribunal or for expert advisors although there was provision for introducing fees in the future.

The tribunal was highly anticipated. In August 2018, a Christchurch Member of Parliament, Duncan Webb, posted a piece on LinkedIn, saying it was hoped the tribunal would "precipitate a reset of justice more generally and provide a model for effective resolution of civil disputes".[42] He went on to state that:[43]While all courts seek to resolve disputes in a speedy flexible and cost-effective way, most are weighed down by an obsession with procedure. This Tribunal has been given the tools to get on with the job of resolving disputes. It will be up to the Tribunal to pick up those tools and use them as intended.

Webb had high hopes for the Tribunal to address the outstanding claims. He believed that as the Tribunal was to be inquisitorial, it would be able to avoid the conflicts that had plagued the cases that had gone to the High Court. The Tribunal's ability to appoint its own experts was designed to avoid the common issue of conflicting expert opinion, "opinion shopping" and the inequalities that arose from the inability to pay for the services of necessary expert witnesses.[44]

The attitude of insurers to the establishment of the Tribunal is made clear by their submissions to the Government and Administration Committee during the passage of the Canterbury Earthquakes Insurance Tribunal Bill through the House. ICNZ's submission appeared to show that it was less set against the establishment of a tribunal than earlier indicated, but it retained some reservations about its operation.[45] ICNZ highlighted that the Ministry of Justice's Regulatory Impact Statement concluded that a dedicated mediation service for claimants and insurers was the Ministry's preferred option.[46] ICNZ agreed with this approach, together with increased resourcing for the current system, such as extending the role of RAS, additional funding for legal advice or increasing availability of experts and expediting court proceedings. ICNZ did note the GCCRS would now address some of these matters, however, the Government's commitment to establishing a Tribunal would likely mean this was the option it would take.

DLA Piper, an Auckland law firm who acted for a number of insurers, also made a submission. Its view was that while the outstanding disputes were in effect simple contract claims, the issues of multiple earthquakes, involvement of EQC, the assignment of claims and on-selling of properties, defective repairs and the involvement of litigation funders had created both legal and practical challenges in resolving claims. These difficulties were the reason for delays in the court system which could not necessarily be resolved any quicker in a Tribunal. It also referred to its experience in

42 Duncan Webb, "Earthquake Tribunal: A Shake-up for Justice" LinkedIn (1 August 2018) https://www.linkedin.com/pulse/earthquake-tribunal-shake-up-justice-dr-duncan-webb
43 Ibid.
44 Ibid.
45 Insurance Council of New Zealand "ICNZ submission on Canterbury Earthquakes Insurance Tribunal Bill" (18 October 2018).
46 Ministry of Justice *Regulatory Impact Assessment: Canterbury Earthquakes Insurance Tribunal* (Regulatory Impact Statement, 3 August 2018).

the Weathertight Homes Tribunal and considered that the CEIT would not be any quicker or more cost effective than using the options already available.[47]

As the legal framework for the CEIT was being established, it became clear that disputes relating to the CES were not going to be resolved as quickly as hoped, as 2018 and 2019 saw a significant increase in claims brought against EQC. The reason was the emergence of negligent assessments of properties and poor repairs of homes, as well as claims for existing damage.[48]

In July 2019, the CEIT was finally launched under the chairmanship of retired District Court Judge Chris Somerville.[49] It was modelled on the Weathertight Homes Tribunal.[50] Its jurisdiction was limited to Canterbury earthquake-related insurance claims for physical loss or damage to residential buildings, property and land. It did not take claims relating to on-sold properties (those houses sold after the earthquakes with new or outstanding earthquake-related issues) or the Kaikōura earthquakes of 2016.

This timeline therefore makes it clear that by the time the CEIT was established, it sat within an existing dispute resolution landscape. This comprised both the Business-as-Usual mechanisms and the various new institutions and reforms that had been introduced in the nine years which had elapsed since the start of the CES and the establishment of the Tribunal. For this reason, the overall "system" is explored below.

(c) The Dispute Resolution Landscape Pre- and Post-CES

At the time of the CES, the process for dispute resolution relating to an insurance claim in Aotearoa New Zealand was relatively straight-forward. If an insured did not agree with the insurer's decision on their insurance claim, they would first be directed to the insurer's own internal dispute resolution service. If the claim was not resolved here, it was referred to as a "deadlock". The insurer had the responsibility to issue a "letter of deadlock" when the parties agreed they could not resolve their dispute. Once the insured received a "letter of deadlock" this enabled them to refer their claim to one of the dispute resolution processes discussed below.

The period 2010–2019 saw increasing (if belated) recognition that effective dispute resolution mechanisms were lacking in the aftermath of the CES. The Judiciary was first to act and created a unique system for managing the huge numbers of earthquake-related cases filed in the High Court. Advisory services for claimants were also quickly established through the RAS to assist homeowners navigate their claims and disputes although RAS did not provide processes for resolution. Eight years after the earthquakes, the Greater Christchurch Claims Resolution Service and the specialist Canterbury Earthquakes Insurance Tribunal were established to specifically deal with earthquake-related disputes. Claimants had a number of options for dispute resolution and the operation of these initiatives is explored below.

47 DLA Piper "DLA Piper Submission on Canterbury Earthquakes Insurance Tribunal Bill Draft" (17 October 2018).
48 Public Inquiry into the Earthquake Commission Report of the Public Inquiry into the Earthquake Commission (March 2020) https://www.dpmc.govt.nz/sites/default/files/2021-01/report-of-the-public-inquiry-into-the-earthquake-commission.pdf.
49 Judge Somerville was a retired Family Court Judge.
50 Public Inquiry into the Earthquake Commission Report of the Public Inquiry into the Earthquake Commission (March 2020) https://www.dpmc.govt.nz/sites/default/files/2021-01/report-of-the-public-inquiry-into-the-earthquake-commission.pdf at 192.

(I) Private dispute resolution services

Claimants could use private dispute resolution services including mediation and arbitration. These are provided by private mediators or arbitrators, or those from the Arbitrators and Mediators Institute of New Zealand or the Resolution Institute.[51] The cost of private dispute resolution is likely to be less than taking a claim through the court system. The services provided are confidential to the parties and therefore the extent to which they were used is unknown.

(II) Financial services dispute resolution schemes (FSDRS)

Claimants could use the FSDRS to resolve their dispute. Insurance companies, as financial service providers, must belong to of one of two external dispute resolution schemes:[52]

(a) Insurance and Financial Services Ombudsman Scheme (IFSO); or
(b) Financial Services Complaints Ltd (FSCL) (A financial Ombudsman service).

These schemes perform similar roles and have similar jurisdictions. The IFSO is the largest scheme and currently has 52 insurer participants.[53] There is no cost to file a complaint with either of these schemes. The jurisdiction of the schemes at the time of the CES was limited to $200,000 plus GST.[54] A complainant has three months from the date of deadlock with their insurance company to notify a complaint to one of these services.

Once a complaint is received it is referred to a case manager, who investigates it using an inquisitorial approach. This involves ascertaining the facts of the case, obtaining evidence from the parties and, in some instances, obtaining evidence from third parties such as engineers.

It is open to the case manager to use negotiation, conciliation or mediation to resolve the complaint. If these options are not possible, then the case manager will make a determination known as an Assessment. The Assessment is made by reference to what is, in the case manager's opinion, fair and reasonable in all the circumstances. This gives the case manager significant discretion, as they are not required to adhere to the strict rules of evidence and law as a court must do. The Assessment is made on the papers alone, without appearances by the parties (although it is open to the FSDRS to contact the parties to talk to them). If the complainant accepts the decision of the case manager, then the decision is binding on both parties. If the complainant does not accept the decision, they then have the option to pursue their complaint in the Disputes Tribunal or Court.

These dispute resolution schemes thus provide a free informal service for complainants without the need for legal representation and the complainants only deal with one case manager throughout the process. The process itself is flexible, and can be adjusted to meet the specifics of the dispute. Although they must consider the law, the case manager is not bound by strict legal requirements and may depart from them. This enables the case manager to consider and adapt to a wider range of factors, for example where a complainant is especially vulnerable or the insurer's conduct has been egregious.[55] Straightforward complaints proceed quickly, with 80 per cent of complaints resolved within 90 days.[56]

51 Arbitrators and Mediators Institute of New Zealand https://www.aminz.org.nz/; or Resolution Institute https://resolution.institute/
52 Financial Service Providers (Registration and Dispute Resolution) Act 2008, ss 3(2) and 11(1).
53 IFSO *Annual Report 2023* (June 2023) at 16.
54 The jurisdictional limit was increased in September 2023 to $350,000 plus GST, and again in July 2024 to $500,000 plus GST under the Financial Service Providers (Rules for Approved Dispute Resolution Schemes) Regulations 2024.
55 John McMillan "Independent Review of the IFSO Scheme" (June 2024).
56 Insurance and Financial Services Ombudsman Scheme (IFSO) "FAQs: Frequently Asked Questions" on website. The figure was 85 per cent, see IFSO, above n 53.

While providing a necessary cost-effective service, there were, however, a number of issues that were barriers to the FSDRS' use as an effective remedy in the post-disaster environment. First, the jurisdiction of the FSDRS at the time of the earthquakes was limited to $200,000 plus GST. This was too low for most property claims and thus excluded a significant number of claims. In September 2023, the IFSO Scheme made changes to its Terms of Reference and Constitution to deal with claims up to the value of $350,000 plus GST. In July 2024, it was increased again to $500,000.[57] The FSCL also increased its jurisdictional limit to $500,000 in July 2024.[58] Although this problem has now been resolved, it was too late for most claimants from the CES.

Second, the insured obtaining "letters of deadlock" from insurers caused problems early on. To refer a claim to the FSDRS, the homeowner required a letter of deadlock from the insurer to state the parties had reached an impasse and needed assistance to resolve the dispute. In the early stages, some insurers simply refused to issue the letter of deadlock.[59] This meant insurers had the power to delay the claimant from filing their complaint with the FSDRS. Under the Insurance Council of New Zealand's Fair Insurance Code 2020 claimants can refer their complaint to the FSDRS who may determine that deadlock has been reached after two months, whether or not an actual letter of deadlock has been issued by the insurer.[60]

Third, the FSDRS were not resourced to deal with the volume of claims and disputes experienced after the CES. The FSDRS are resourced to deal with the workload in "normal times". Had claims fallen within their jurisdiction after the CES, they are likely to have found it difficult to cope and there would likely have been delays in obtaining determinations as a result.[61]

Fourth, most Ombudsman determinations are undertaken on the papers alone.[62] This process does not always suit homeowners, who often want a round-the-table meeting with their insurer. After the CES, many homeowners wanted a meeting with their insurer to "put a face to the claim" and to explain the impact the disaster, the claims process and the dispute had had on them. The FSDRS is simply not resourced to provide such a process to all claimants in a post-disaster dispute environment where there is a significant number of disputes being filed at the same time.

Fifth, there was the perception by claimants that the FSDRS are not independent because they are funded by insurers. Furthermore, there was a perception that the FSDRS are not sufficiently resourced to handle a high volume of claims in a post-disaster situation.

57 See IFSO, above n 53, at 19; also see MBIE *Approved Dispute Resolution Schemes: Minimum Compensation Cap for Insurance Disputes* (Discussion Document, March 2015) https://www.mbie.govt.nz/dmsdocument/3212-dispute-resolution-compensation-cap-discussion-document-pdf.

58 Financial Services Complaints Ltd "Increased compensation limits for financial disputes" FSCL https://fscl.org.nz/news/increased-compensation-limits-for-financial-disputes/.

59 Participant 8.

60 Insurance Council of New Zealand Fair Insurance Code 2020 (effective April 2020) at 13.

61 "Bulging backlog creating a crisis in Office of the Ombudsman" *The New Zealand Herald* (15 February 2012).

62 There may also be communications between the case managers and the individual parties or from time-to-time conciliations are conducted with parties in a room together, on Teams or on the telephone (email from FSCL 26 September 2024).

(III) Disputes Tribunal

The Disputes Tribunal was established under the Disputes Tribunal Act 1988 and is regulated by the Disputes Tribunal Rules 1989. It is a division of the District Court and provides a service for the resolution of civil claims including contract and quasi-contract, tort and certain statutory claims,[63] up to the value of $7,500 (or $12,000 by consent) at the time of the CES.[64]

The Disputes Tribunal has low-cost filing fees,[65] is informal and does not allow legal representation, which makes it less expensive than a court. Disputes are determined by a Referee and, although they must be guided by the law, it has informal and flexible rules of evidence. A Referee's decision is an order of the District Court and is legally binding. A party can only appeal the Referee's decision on the grounds that the Referee ran the hearing in a way that was unfair and which had an effect on the result. Appeals are made to the District Court.

The Disputes Tribunal is unlikely to have been used by many residential property owners for their earthquake-related disputes because the value of the insurance claims would likely have exceeded the Tribunal's jurisdiction.

(IV) Courts

The District Court hears civil claims up to the value of $350,000. The jurisdiction was changed in March 2017 from $200,000 to the current amount. Disputes in the District Court are determined by a District Court Judge. The procedures are formal and thorough, and as a consequence, slow. Legal representation is desirable in this forum which makes it expensive. Appeals from the District Court are made to the High Court.

The High Court hears complex civil claims or claims over $350,000. It is a court of general jurisdiction and is the highest court in Aotearoa New Zealand able to hear cases at first instance. It also hears appeals from lower courts and tribunals. Disputes in the High Court are determined by a High Court Judge. The procedures are formal and thorough and therefore dispute resolution is slow and expensive. Legal representation is desirable in this forum too which adds to the costs for applicants. Appeals from the High Court can be made on certain grounds to the Court of Appeal.

As noted above, soon after the CES, it became apparent that the courts were overwhelmed with the volume of disputes. The judiciary recognised that a better system of managing the claims needed to be implemented to ensure a more streamlined process than what was occurring in the usual way. This recognition, combined with the Chief High Court Judge's commitment to ensuring earthquake cases would be dealt with as swiftly as the Court's resources would permit, paved the way for the creation of the first High Court Earthquake List in May 2012. The purpose of this list was to ensure earthquake-related cases received fast-track case management by expeditious processing at the early stages of the cases, through to trial and to ensure that priority was given to urgent cases or those with precedential value. The list is still operational today, being an innovative idea in response to a disaster that worked and continues

63 Some legislation gives the Tribunal jurisdiction to determine specific matters such as Consumer Guarantees Act 1993, Credit Contracts and Consumer Finance Act 2003, Fair Trading Act 1986, Fencing Act 1978, Friendly Societies and Credit Unions Act 1982 and Contract and Commercial Law 2017; see Disputes Tribunal Act 1988, sch 1, pt 2.

64 The jurisdiction was increased in 2014 to $15,000 ($20,000 by consent) and again in 2019 to $30,000 (Janet Robert-Shawe, Principal Disputes Referee, "Disputes Tribunal: Bridging the Justice Gap" (November 2021). Legislation to increase the financial jurisdiction of the Disputes Tribunal further from $30,000 to $60,000 is currently before Parliament (with a first reading of the Bill on 19 November 2024). These increases in jurisdiction would have made little difference to earthquake-related claims as the majority of unresolved disputes still involved considerably greater sums than the jurisdiction of the Disputes Tribunal.

65 Filing fee is $59 for claims under $2,000, $117 for claims from $,2000–$5000 and $234 for claims $5,000 or more see Disputes Tribunal "Forms and Fees" (19 July 2024) https://www.disputestribunal.govt.nz/forms-and-fees/.

to work relatively well.[66]

Despite the success of the Earthquake List, resolving disputes in the courts also came with problems. One glaring issue was the significant power imbalance between the insured and insurers. Large insurance companies, being repeat players in the litigation scene, were pitted against inexperienced first-time litigants. Many disputes were long, drawn out, expensive and often affected the mental and physical health of the claimants.[67]

(V) Residential Advisory Service (RAS)

In 2013, an independent specialist service called the Residential Advisory Service (RAS) was established, ostensibly in response to media reporting that homeowners needed support, and particularly the Christchurch City Council (CCC) advocating for a service. It was established by the Canterbury Earthquake Recovery Authority (CERA) together with support from insurers through the Insurance Council of New Zealand, the CCC, and EQC, to provide an independent, free service to assist, advise and support property owners of earthquake-damaged homes navigate the insurance claims and dispute process. It partnered with Community Law Canterbury to provide free, independent legal advice. During 2014 and 2015, RAS expanded its services to provide some technical support from engineers. It provided the services of a broker who assisted by arranging meetings with all parties involved in the claim. It has been perceived as a successful initiative for dispute resolution and has generally been positively received by its users.[68]

In 2017, it was determined that the services RAS provided were not sufficiently supporting homeowners, owing to a couple of problems that had emerged. The first was the perception of independence, as RAS was partly funded by the Insurance Council through insurers. The second was that the disputes were becoming more complex and more engineering-based. In 2017, the decision was made to seek Cabinet funding to make RAS Crown-funded. It then started to work with Engineering New Zealand to support homeowners with engineering advice. The other change in 2017 was the move away from a model of homeowners being sent to Community Law or getting legal advice to one of case management in order to provide guidance for homeowners in their journey navigating the system to resolve their case.

The new Labour coalition Government was elected in 2018. It aimed to take action on the outstanding insurance claims from the CES. It saw that there were a lot of homeowners who could not move on with their claims and lives owing to health and wellbeing issues and argued the services available were not working to meet this need. This led to a rethinking of the model for a dispute resolution service, resulting in the establishment of the Greater Christchurch Claims Resolution Service and the Canterbury Earthquakes Insurance Tribunal in 2018. Since the establishment of the GCCRS, RAS now applies its services to claims relating to disasters other than the CES.

66 Nina Khouri "Civil Justice Responses to Natural Disasters: New Zealand's Christchurch High Court Earthquake List" (2017) 36(3) Civil Justice Quarterly 316; Participant 20 also commented that the Earthquake List seemed to work well.

67 Michael Hayward "Nearly seven years on, thousands of Christchurch earthquake insurance claims remain" Stuff (10 February 2018) https://www.stuff.co.nz/national/101036282/nearly-seven-years-on-thousands-of-christchurch-earthquake-insurance-claims-remain; "Open letter to Justice Minister Andrew Little to fix 'failed' quake court" Stuff (11 January 2018) https://www.stuff.co.nz/national/100463621/open-letter-to-justice-minister-andrew-little-to-fix-failed-quake-court.

68 See statement on government website Beehive.govt.nz on 24 June 2014 by the Associate Earthquake Recovery Minister Nicky Wagner who said "survey results show RAS is extremely effective with 84 per cent satisfied or very satisfied while 96 per cent said they were listened to or understood"; https://www.beehive.govt.nz/release/residential-advisory-service-making-difference

(VI) Greater Christchurch Claims Resolution Service (GCCRS)

In late 2018, the Government established the Greater Christchurch Claims Resolution Service (GCCRS) to specifically assist with earthquake-related insurance claims and dispute resolution. It was one of a number of initiatives carried out in response to the 2018 Independent Ministerial Advisor's Report to speed up the resolution of outstanding insurance claims to EQC.[69] It is operated by the Ministry of Business, Innovation and Employment together with support from Treasury, EQC, private insurers, Community Law and Engineering New Zealand. The work with Community Law continued for legal advice, and the partnership with Engineering New Zealand was formalised to launch a number of services such as peer reviews, facilitations (where an engineer facilitates between two engineers) and initial appraisals (where the insurer has not obtained an engineering report and the insured cannot afford to pay for one). There were also some new initiatives from the RAS system. The case management system was expanded with more case managers employed to increase the numbers of homeowners that could be dealt with at one time. A second new initiative was a wellbeing support package for homeowners which was provided through Pathways to support claimants' mental health throughout the claims and dispute process. The third was an internal dispute resolution service which offered mediation and determination using a panel of retired judges experienced in dispute resolution who understood what GCCRS was trying to achieve. A lot of work went into this system to ensure it met the needs of homeowners.

The GCCRS fills the gap in dispute resolution between the RAS and the Tribunal/Court system. It provides homeowners with free facilitation and determination services, including engineering and legal advice, as well as well-being support. It leads the claim process by coordinating with all agencies involved to work through the issues. If the dispute cannot be resolved by negotiation, the GCCRS provides an internal dispute resolution service of mediation, determination by arbitration or a combination of both. Both parties can elect to refer their claim to these services. However, it is not compulsory for parties to use them. User exit surveys have recorded that a high percentage of homeowner users would recommend the GCCRS to others.[70] The GCCRS spends time explaining to homeowners their rights and obligations under their insurance policies. If the insurer disagrees, the issue is one of interpretation, and the GCCRS advisors advocate for the interpretation as they see it on behalf of the homeowner.

The work of the GCCRS is informed by a Customer Charter. This Charter was developed by consulting with some of the homeowners who were pushing hard for change.[71] The GCCRS was built from that, and everything it has done and how it operates relates back to the Charter. A key question GCCRS is guided by is: "Is what we're about to do going to actually help the homeowner better?".[72] The core principle of putting the homeowner at the centre has helped build an effective service.

The GCCRS had a significant influx of claims at the start. When it was established it prepared for the workload by having a large number of staff to meet demand. For example, it was able to communicate with most homeowners who contacted it within 48 hours.

One of the main reasons for establishing the GCCRS was to address the power imbalance between the insurer and the insured.[73] Immediately after the CES, the only options for dispute resolution for homeowners were either the FSDRS

69 Independent Ministerial Advisor's Report, reported in Department of Prime Minister and Cabinet "Inquiry into the Earthquake Commission Proactive Release" (January 2019).
70 For example, in the GCCRS Advisory Committee Meeting Minutes 22 March 2022, 82 per cent of respondents would recommend the GCCRS to others.
71 Participant 8.
72 Participant 8.
73 Ibid.

or the courts. However, the FSDRS services had a jurisdictional limit of $200,000 plus GST so most claims were outside this limit and, if claimants did consider it as an option, the public perception was that it was not independent as it is funded by insurers. If court was the only option, the insurers could and would put significant resources into the court proceedings. "Homeowners were often up against Queens Counsel (at the time) and the cost and delay meant there was very little if any justice for the homeowners".[74]

Another reason for the establishment of the GCCRS was to create a system that provided an inquisitorial approach, gave a binding decision and brought finality to a claim without any appeal (so that it could not continue and be taken to Court). At the time it was established, it was not known there was the possibility of a Tribunal.[75] So, the two entities were established close in time with similar functions. However, the GCCRS has worked closely with the Tribunal, referring approximately 50 per cent of the Tribunal cases.[76] The benefit of this system was that it gave homeowners choice to either go to the GCCRS for a determination or to the Tribunal for adjudication.

The GCCRS's mediation service has been popular and successful in terms of settlement rates with 90 per cent of cases settled after mediation.[77] However, the determination service was not as successful because the GCCRS was not able to convince insurers to participate and they were not required to. The reason insurers were not keen to use the determination service was they wanted the ability to appeal the decision.

The other problem with the GCCRS was that to provide a service that was quick to elicit a final decision, it was also confidential. Thus, it did not provide precedents for future cases. The insurers were happy with the confidentiality and no precedent outcome but, for advisers and other homeowners, this was not helpful to subsequent cases because they did not know how the determinations were being decided.

The GCCRS was considered such a success by the government that, in February 2023, following the Auckland floods and Cyclone Gabrielle, the New Zealand Claims Resolution Service was launched. It has replaced the GCCRS to form a new entity that now covers all of Aotearoa New Zealand.

3. CANTERBURY EARTHQUAKES INSURANCE TRIBUNAL

As explored above, the Canterbury Earthquakes Insurance Tribunal was established in response to the significant challenges to the dispute resolution system which arose in the aftermath of the Canterbury earthquake sequence of 2010/2011. These events led to widespread damage to properties, resulting in a surge of residential insurance claims as residential property owners tried to realise their right to housing and their right to an effective remedy. However, many policyholders encountered difficulties in resolving disputes with their insurers regarding coverage, claim settlements, and interpretation of policy terms. Recognising the need for a specialised forum to address these complex and contentious issues, the Labour-led New Zealand Government established the Canterbury Earthquakes Insurance Tribunal in 2019. This Tribunal aimed to provide an accessible, efficient, and impartial dispute resolution mechanism specifically tailored to the unique circumstances arising from the earthquakes. By offering an alternative to traditional legal proceedings, the Tribunal sought to expedite the resolution of insurance disputes, alleviate the burden on the court system, and facilitate the recovery process for affected individuals in the Canterbury region. It was

74 Ibid.
75 Ibid.
76 Ibid.
77 Ibid.

established under the Canterbury Earthquakes Insurance Tribunal Act 2019 which came into force on 10 June 2019. It provides a dispute resolution process free of charge in the form of mediation and adjudication as well as a case management system. Those managing cases are called Tribunal Members. The Tribunal was mandated to operate using an inquisitorial approach to the resolution of disputes. It must apply the law and is subject to the principles of natural justice to ensure that is processes are fair and transparent.[78]

(a) Jurisdiction and Procedure

The Tribunal has a limited jurisdiction and only covers residential property (and land) insurance claims arising from the Canterbury earthquakes between the specific dates of 4 September 2010 and 31 December 2011.[79] The Tribunal deals with disputes between insured persons and both private insurers and EQC.[80] Claims to the Tribunal can only be made by insured persons or, where a claim has been started in a Court, by a Court order transferring the proceedings to the Tribunal.[81] Insurers and NHC (formerly EQC) cannot bring claims to the Tribunal.

In addition to the above, the applicants must have been an owner of the property and must have had the insurance in their name at the time it was damaged, thus excluding disputes relating to properties "on sold" after the damage occurred.[82] The property in dispute must also have been used as a residence (for claims against an insurance company) or 50 per cent of the property used as either a residence or rest home (for claims against EQC/NHC).[83]

Once these criteria are met there is no limit on the monetary jurisdiction of the Tribunal and related parties that can be joined as respondents. It can therefore deal with high value disputes and complex issues. The jurisdiction of the Tribunal is thus equivalent to the High Court in the specialist field of residential property insurance disputes.

Disputes can either be disputes relating to damage caused by the CES earthquakes themselves (so called first disputes) or disputes relating to damage caused after 31 December 2011 (defined as the end date of the CES), when a first dispute already exists in relation to the property.[84]

Applicants to the CEIT do not need legal representation or an advocate. The CEIT has guidelines to assist self-represented applicants.[85]

The CEIT is intended to take an inquisitorial approach and encourage settlement of disputes by:

- providing preliminary hearings on disputed facts or contested legal issues;
- referring the parties to mediation at any stage in the proceedings;
- actively seeking evidence or making appropriate enquiries;
- requesting the High Court make a ruling on an important legal issue not previously determined by a court;
- directing the parties' experts give evidence together and be able to ask each other questions under oath; or

78 Canterbury Earthquakes Insurance Tribunal Act 2019, ss 37 and 56(b); see Ministry of Justice, "Working to resolve earthquake claims? Let's get it settled" (Canterbury Earthquakes Insurance Tribunal Practice Notes) at 2.
79 Canterbury Earthquakes Insurance Tribunal Act 2019: s 5 (definition of "Canterbury earthquakes"), s 8(1) – Application of Act to claims for physical loss or damage to a residential building or residential property – so it does not include contents claims.
80 Canterbury Earthquakes Insurance Tribunal Act 2019, ss 8(1) and (2).
81 Sections 10 and 16.
82 Section 8(4).
83 Canterbury Earthquakes Insurance Tribunal Act 2019, s 8(5); CEIT *Annual Report of the Canterbury Earthquakes Insurance Tribunal for the 12 months ended 30 June 2023*.
84 Canterbury Earthquakes Insurance Tribunal Act 2019, s 8(3).
85 Canterbury Earthquakes Insurance Tribunal "Guidelines for self-represented applicants in CEIT" https://www.justice.govt.nz/assets/CEIT-Guidelines-for-self-represented-applicants.pdf.

- holding a special sitting at which the expert evidence from a number of claims can be heard together so that consistent rulings can be made on complex technical issues.

In a significant number of cases the dispute centred on the correct repair methodology. Therefore, expert evidence was essential for resolving these disputes. The CEIT used independent experts in a number of ways; to provide independent reports on issues in dispute; on occasion acting as advisers to the CEIT and the parties and at other times consulting with experts to resolve technical disputes by agreement between the parties' expert advisors.[86]

The CEIT is able to make any order that a court could make in accordance with the terms of an insurance contract in dispute and the general law of New Zealand, including contract law and the Earthquake Commission Act 1993. It can also award general damages and costs and expenses owed under the insurance contract. The CEIT provides a written decision including reasons and this decision is legally enforceable as if handed down by a District Court. If the parties reach a settlement by agreement before a decision is made by the Tribunal, the CEIT can record the settlement in the form of a decision. Appeals can be made on a question of law or fact to the High Court with leave.[87] Appeals to the Court of Appeal and Supreme Court can only be made on a question of law with leave of the Court.[88]

As the CEIT is not a court of record, it is not required to report all of its decisions. All substantive and any significant procedural decisions are published on the Tribunal's website.[89] A participant said reporting generally occurred on decisions that may have had an impact on other cases.[90] However, it was up to the individual Tribunal Members to determine if their case was one that should be made public and if so, refer it to the Tribunal Chair for publication.

The Canterbury Earthquakes Insurance Tribunal Act 2019 provides for questions of law to be referred to the High Court.[91] The Tribunal used this mechanism in a small number of key cases. If a similar mechanism to refer legal questions directly to higher courts had been available in the early years after the CES, it would have allowed a significant number of legal questions to be resolved earlier. This would have avoided later referrals which slowed down the resolution of individual disputes.[92]

(b) Resolution of Disputes

(I) Case management

The Tribunal uses case management to assist in the resolution of disputes and places particular emphasis on the first case management conference. It requires all parties to attend this conference because it is the first opportunity for homeowners to meet with the insurer at a neutral venue.[93] Moreover, the first case management conference allows self-represented claimants to express the issues impacting them that might not be well expressed in their application and therefore provide the Tribunal Member with the opportunity to clarify any outstanding issues between the parties. Any further case management conferences are usually conducted by teleconference.[94] The CEIT

86 These may involve engineers as experts. See Engineering New Zealand "Our Natural Disaster Recovery Panel" https://www.engineeringnz.org/public-tools/new-zealand-claims-resolution-service/expert-engineering-panel/
87 Canterbury Earthquakes Insurance Tribunal Act 2019, s 54.
88 Section 54.
89 Participant 7.
90 Participant 3.
91 Canterbury Earthquakes Insurance Tribunal Act 2019, s 53.
92 Participant 7.
93 CEIT *Annual Report of the Canterbury Earthquakes Insurance Tribunal for the 12 months ended 30 June 2023.*
94 Ibid.

views the case management process positively, noting that one in seven applications settle at, or soon after, the first case management conference, while approximately half of applications settle at, or soon after, case management conferences as a whole.[95]

(II) Mediation

The Tribunal includes access to an independent, fully-funded mediation service provided by the Ministry of Business Innovation and Employment.[96] After the first case management conference, the parties can consent to mediation or the Tribunal can direct the parties to attend mediation.[97] The timeframe for the mediation can be mandated by the Tribunal to keep the case progressing.[98] Parties can represent themselves at mediation, although MBIE recommends representation at the parties' own expense. Parties may also bring support people. The Mediator does not have the power to determine any matter in the mediation even if asked to do so by the parties.[99] Mediation settlements are confidential, binding and enforceable.[100]

(III) Tribunal-led Settlement Conference

The Tribunal holds a settlement conference to assist the parties to resolve their dispute. A settlement conference is a standalone conference that seeks to explore all possibilities for settlement. This conference is not a hearing although if settlement is not reached the parties are able to seek direction on the next steps which may or may not include progressing towards a hearing.

(IV) Determination

Resolution of the dispute is the focus of the Tribunal and is sought at every stage through case management. Therefore, if adjudication is required to resolve a dispute, a case management conference must be held to prepare for the hearing.[101]

If a resolution is not reached in any other way, the case is heard by a Tribunal Member in an adjudication. The Tribunal has broad powers to prepare for and manage the hearing of the dispute, including appointing an expert to assist the Tribunal, and convening conferences of the parties or experts.[102] The Tribunal is also able, on its own initiative, to obtain evidence and make any investigations and inquiries it considers appropriate.[103] The hearing of the dispute is held in public unless the Tribunal orders otherwise and may be conducted by remote access facility if the Tribunal considers it appropriate to do so.[104]

95 Ibid at [13].
96 Ministry of Justice "Canterbury Earthquakes Insurance Tribunal: Features of the Tribunal" https://www.justice.govt.nz/tribunals/canterbury-earthquakes-insurance/about-the-tribunal/features-of-the-tribunal/
97 Canterbury Earthquakes Insurance Tribunal Act 2019, s 27.
98 Section 27.
99 Section 32
100 Sections 33, 34 and 35.
101 Section 38.
102 Section 39.
103 Section 40.
104 Section 41.

The Tribunal has broad powers to make any order it considers appropriate, being any order that a court of competent jurisdiction could make in accordance with the terms of the insurance contract and the general law of New Zealand.[105] For example, it can award payments of general damages and costs and expenses payable under a contract of insurance between the parties. The Tribunal does have the power to award costs against a party.[106] However, the circumstances in which it may do this are limited to situations where the Tribunal considers a party caused costs and expenses to be incurred unnecessarily by acting in bad faith or making allegations or objections that are without substantial merit or if the party caused unreasonable delay, including by failing to meet a deadline set by the Tribunal without a reasonable excuse for doing so.[107] The Tribunal also has the power to award interest in a claim for the recovery of money.[108] Tribunal decisions are enforceable as if they were orders of the District Court.[109]

(V) Usage statistics

At the time of writing, the Tribunal's Annual Report 2023 noted it has accepted a total of 148 claims since its inception on 1 June 2019. Twenty-two remain open.[110] All those applications received in 2019 and 2020 have now been resolved, however there are still a number of claims from 2021, 2022 and 2023 which remain unresolved.[111]

The Tribunal was established to provide a flexible and cost-effective dispute resolution service. Unfortunately, it was only resourced to deal with 50 claims in 2019, which proved to be a significant underestimate with the actual complaints being around double that expected. As a result, the Tribunal initially struggled with the caseload and the novelty of the new process. Fortunately, the resourcing issue was resolved for the year 2020/2021 by the appointment of four new Tribunal members. Nevertheless, these early resourcing issues continue to be reflected in the time taken to resolve disputes.[112] Three of the cases settled in 2022/2023 had been received in 2019/2020.

The workload of the Tribunal has reduced dramatically in 2023,[113] with only 12 accepted applications in the year to 30 June 2023, compared to 116 in its first year (2019).[114] The reduction in claims has seen Tribunal reduce in size. From its original total of seven members, it now has only four members, all of whom are part time.

105 Section 46.
106 Section 47.
107 Section 47.
108 Section 48.
109 Section 52.
110 See figure 1 below.
111 Three applications from 2021, six applications from 2022 and five from 2023. CEIT, above n 83.
112 CEIT *Annual Report of the Canterbury Earthquakes Insurance Tribunal for the 12 months ended 30 June 2023*; CEIT *Annual Report of the Canterbury Earthquakes Insurance Tribunal for the 12 months ended 30 June 2022*; CEIT *Annual Report of the Canterbury Earthquakes Insurance Tribunal for the 12 months ended 30 June 2021*; CEIT *Annual Report of the Canterbury Earthquakes Insurance Tribunal for the 12 months ended 30 June 2020*.
113 Ibid.
114 Ibid.

Figure 1: Applications accepted in the CEIT from 1 June 2019 to 30 June 2023.[115]

The Tribunal reports that there are four main reasons given by homeowners for bringing a dispute to the Tribunal, namely:[116]

(a) the process is less adversarial than a court and a lawyer is not needed;
(b) negotiation and discussion for resolution of the dispute has not worked;
(c) the process is inexpensive as there are no filing or hearing fees; and
(d) no awards of costs are made if their application is unsuccessful.

The case management conferences seem to provide the most opportunities for the resolution of disputes in the Tribunal. In the following graph taken from the CEIT's Annual Report 2023, the case management conferences stand out from mediations and adjudications with the highest number of settlements. However, the graph also highlights the time taken to resolve the disputes. Most cases were resolved at a further case management conference or a settlement conference and the average time taken until resolution was 464 and 489 days respectively. Cases that went to a hearing took on average 555 days. Although settlement of these disputes is likely to take less time than a court, the time taken for resolution seems lengthy given the Tribunal's aim to provide a speedy process. No doubt the complexity of the claims slows down the process.

115 CEIT *Annual Report of the Canterbury Earthquakes Insurance Tribunal for the 12 months ended 30 June 2023.*
116 Ibid.

Stage at resolution	Total	Avg Days
Settled privately before Tribunal action	**8**	88
Settled at or after First CMC	**16**	190
Settled at or after further CMC	**62**	464
Settled at or after mediation	**7**	233
Settled at or after settlement conference	**24**	489
Decision issued & claim closed	**9**	555
	126	**337**

Figure 2: Applications resolved by stage since inception [of the CEIT][117]

4. STAKEHOLDER PERCEPTIONS OF THE CANTERBURY EARTHQUAKES INSURANCE TRIBUNAL

The CEIT did not live up to the high expectations that those who advocated for its creation had for it. It was intended to utilise an inquisitorial approach, but many participants did not experience this. Despite some innovative procedures more reflective of the philosophy of a Tribunal, as time progressed, the Tribunal seemed to move away from the original intentions and instead came to operate more like a mini-court, leading to similar experiences to those experienced in the formal court process. Thus, there were procedural formalities, delays and expense, the antithesis of how the Tribunal was intended to operate.

It is notable that experiences and perspectives of the research participants familiar with the practice of the Tribunal varied greatly, depending on whether they were working for the Tribunal or not. Tribunal members and employees generally had a much more positive view of the Tribunal's operation, reporting that the Tribunal worked extremely well, often using the high number of settlements to support this conclusion. Other research participants, including legal representatives, did not consider the Tribunal to have worked as intended. Many reported frustrations with the Tribunal and expressed overall disappointment in its operation in practice. Some participants said they would not recommend their clients use the Tribunal.[118] Three participants reported the Tribunal worked well in certain aspects; one said the case management conferences were well managed,[119] another said it was helpful to be able to use the Tribunal as a threat to insurers to assist resolution of the dispute,[120] and another participant said the Tribunal worked well when it acted like a Tribunal and not like a Court.[121]

117 CEIT *Annual Report of the Canterbury Earthquakes Insurance Tribunal for the 12 months ended 30 June 2023* at [31].
118 Participants 10, 17, 22.
119 Participant 14.
120 Participant 23.
121 Participant 18.

After its first three years of operation, the CEIT revised its practice-notes to better address the delays (which had clearly been experienced by the research participants). The CEIT acknowledged the prolonged timeframes during which homeowners were in dispute with their insurers and that this led to difficult interpersonal relationships between the parties. This added to the complexity of cases.[122] It revised its practice notes to address these timeframe issues and in 2023 reported that the changes appeared to be working.[123]

The research team's assessment of the CEIT is explored thematically in the sections below. The themes chosen reflect common issues raised by the research participants, and cover both the perceived advantages and disadvantages of the Tribunal. Although this report focuses on the Tribunal, it is notable that other elements of the dispute resolution process were often discussed by participants. This emphasises the holistic nature of dispute resolution systems, and that discussion of the Tribunal in isolation is somewhat artificial. In many cases the issues that arose were common to all elements of the post-disaster dispute resolution system. The project team has therefore chosen to include these issues where the Tribunal was part of the discussion. Our findings make it clear that further research is needed to fully contextualise the Tribunal within the wider post-CES dispute resolution landscape as a basis for future holistic reform.

(a) Access to justice and the right to an effective remedy

One of the key problems identified in relation to dispute resolution in the early stages of the recovery phase was the inability of claimants to access dispute resolution mechanisms. For the reasons explored above, claimants were funnelled into an expensive and overloaded High Court. This meant that the right to an effective remedy for residential property owners to realise their right to adequate housing after the CES was not fulfilled. The Tribunal was introduced to address this lacuna.

Participants largely agreed that the Tribunal had succeeded in providing an accessible process for the resolution of disputes. It is easy to access and there are no filing or hearing fees. In terms of access to justice, it also provides an alternative dispute resolution option for claimants to the court system.

Some participants noted how the establishment of the Tribunal changed the behaviour of the insurers. The existence of the Tribunal gave claimants the ability to use the Tribunal as a "carrot" or "stick" for encouraging the parties to continue working towards resolution of the dispute. This was a significant advantage. For example, one participant said:[124]

> The difference in the insurer pre-launch of the Tribunal and after was significantly different. Some of the hard insurers might have said "Well that's the offer. If you don't like it go file in the High Court". The Tribunal gave us the ability to go "Oh, great, we'll take you to the Tribunal" and they immediately go "Well, let's see if we can come to some sort of arrangement."

As a result, one participant argued the Tribunal cannot be judged as successful or not merely by the number of cases that have gone through it because there are likely to have been a significant number of cases that have settled purely because the Tribunal exists.[125]

122 Annual Report of the Canterbury Earthquakes Insurance Tribunal (For the 12 months ended 30 June 202) at [7].
123 Annual Report of the Canterbury Earthquakes Insurance Tribunal (For the 12 months ended 30 June 2023) at [10]. Also see Ministry of Justice, "Working to resolve earthquake claims? Let's get it settled", Canterbury Earthquakes Insurance Tribunal Practice Notes.
124 Participant 8.
125 Ibid.

Therefore, the fact the Tribunal existed was important in itself. It provided an affordable avenue for claimants who were unhappy with the offers provided by their insurance companies (or EQC). In particular, the prospect of determination/adjudication in the Tribunal encouraged settlement by insurance companies (compared to the GCCRS, where insurers were not required by law to be involved in a determination). It also mitigated the imbalance between the parties that existed when the only option was the High Court, a prospect that few insured would relish.

However, this positivity towards the Tribunal as a means of accessing an adjudicatory process was tempered by its failure to fundamentally alter the dispute resolution environment. As one participant noted, "I'm not saying the insurance tribunal wasn't an improvement. But it wasn't transformative. It needed to be transformative."[126]

(b) Innovative procedures

One area where the Tribunal does well is in its use of innovative procedures. One insurer participant said the first case management conference was one of the significant advantages of the system. It brings the parties together at an early stage to a face-to-face meeting, and thus allows the insured to tell their story and to be heard. The participant said:[127]

> The Tribunal has been fantastic … You bring the parties together at the earliest opportunity possible and let each side have their say – and that's something there's a place for. Often the way to resolve the dispute is just let people vent and say what they want to say. Using the first case management conference is an opportunity to hear them out. And sometimes you can get it on the path because that's what most of the difficulties were, that people were so angry.

Another innovative feature of the Tribunal is its ability to oversee cases to their conclusion. For example, a case where it has been determined that certain repairs are required to a property can be kept open to allow the insured to refer it back to the Tribunal if any problems arise during the repair process, rather than having to file a new claim. This is a significant advantage for insureds because it allows the Tribunal a degree of oversight over the whole process until the work is completed. As one participant noted:[128]

> One of the benefits of the Tribunal is that in the Tribunal now it oversees the repair so the homeowner can say I don't care about the money I just want you to follow the policy and repair my house. So, the Tribunal keeps the case open so that any disputes that arise during the process can be brought back. It does depend on the policy [however] and new policies now give the insurer the sole discretion as to whether they will pay out or manage the repair.

This active management of the whole process of the claim and dispute to conclusion is a positive and novel aspect which ensures that disputes are actually settled and there is finality for the parties. A third notable and innovative feature of the Tribunal was the use of "hot tubbing of experts". Hot tubbing is when experts are brought together to come up with a solution to repair the property. This was a practice that participants said worked well in the Tribunal because it is a more controlled environment than the Court.[129] Therefore, the ability of the Tribunal to bring experts together in this way was an advantage.

126 Participant 1.
127 Participant 14.
128 Participant 9.
129 Participants 3, 18, 21, 22 and 23.

Despite the innovative features of the Tribunal noted above, the contrast between those who participated in the Tribunal decision making and those who utilised the process was stark. Tribunal members and employees compared the CEIT with their experiences in other formal court environments. If compared with these examples, the CEIT did look innovative indeed. However, it was not to the extent desired by claimants, their legal representatives and those who had advocated for its creation.

As explained above, the Tribunal was established to be informal and flexible. Most participants were enthusiastic about the introduction of a Tribunal to assist with the resolution of disputes and reported it started off well. However, as time went on the Tribunal appeared to be slowed down by procedure and formalities. Most participants expressed disappointment with the formality of the Tribunal process and that it soon became akin to a mini-court. Some examples are provided below:

- "Once the lawyers were in there the Tribunal just handed it over to the lawyers and said run it like a court and it was hopeless, very disappointing".[130]
- "Essentially it's a replica of the court process".[131]
- "The tribunal did absolutely turn into another court, yes".[132]
- "All of the good things that [the Chair] put in place at the start around expert reporting and all that seem to have gone by the wayside now and it seems to be almost as slow as a court".[133]

One participant who was particularly disappointed that the Tribunal's processes became more Court-like noted:[134]

> I used to sit next to the Weathertight Homes Tribunal and that's another example of a tribunal [where the] objective was to streamline a difficult process but it ended up essentially mimicking the High Court. And it strikes me that that's pretty much what the Insurance Tribunal has done. And that's really disappointing because it was supposed to be a quick, low documentation, simple procedure."

Another said the CEIT was supposed to be a change from the court system to a more expedited process, but it too got bogged down in detailed processes: "The cases I took to the Tribunal were overwhelmed with evidence from the insurer".[135]

Another common issue raised by participants was the increasing use of adversarial procedures, with the judge acting as a passive neutral participant rather than driving the case. Such a system risks tilting the scales in favour of the party with the most resources, the so called "repeat player" in Galanter's typology.[136] One participant explained it as

130 Participant 10.
131 Participant 17.
132 Participant 21.
133 Participant 20.
134 Participant 1.
135 Ibid.
136 Galanter, above n 14.

follows: [137]

> The new system was intended to be inquisitorial. Well, that was a joke. It was just such a non-inquisitorial system. Cases were run where costs were ratcheted up to hundreds of thousands of dollars again and the problem was, we still had cost and delays and worse. You had a situation where a homeowner might spend $100,000 to get $400,000 back. They're 100 out and they've got to repair the house. It's an inherent failing in the system – when you're using the money that you need to repair the house to run the case to get the money.

The Tribunal faced the challenge of trying to address the power imbalance between the parties in the hearing. The process worked if one party was unrepresented (usually the insured). However, where both parties were represented this changed. One participant noted that some Tribunal Members left the hearing for the lawyers to run which then turned proceedings into a mini-court, which was not what it was intended to be.[138]

Other participants noted that the Tribunal's failure to operate in a consistently inquisitorial fashion failed to resolve the imbalance between the parties: [139]

> [Insurers] can afford experts – lawyers, engineers, builders. If a statement of claim is filed without clarity and extremely poor evidence is filed, the judge can point this out and some do. But if they don't, the clients are none the wiser because they don't know what good quality legal services are.

The consequence of the Tribunal's failure to comprehensively use informal procedures was that it became "bogged down" in formality which caused delay, necessitated the need for legal representation and therefore increased costs to the parties. It also risked undermining the ability of the CEIT to resolve the power imbalance between the parties

(c) Awarding of costs

One of the main reasons for the Tribunal's establishment was to reduce the costs for dispute resolution for claimants in comparison with the High Court through the limited award of costs. This was confirmed by some participants who identified the limited awarding of costs as a key advantage.[140] Although the Tribunal may award costs against a party whether that party is successful or not, it will only do so if it considers the party caused costs and expenses to be incurred unnecessarily by acting in bad faith, making allegations or objections that are without substantial merit or the party caused unreasonable delay, including by failing to meet a deadline set by the tribunal without a reasonable excuse.[141] Knowing that costs would not be awarded against them helped claimants understand what they might be liable for when deciding whether to submit to a determination. One legal representative participant said: [142]

> So, when my clients knew that it was going to cost X and they probably wouldn't get that back, but the current offer would be increased, sometimes tenfold, they were willing to take that risk. The High Court with its cost regime was scary for people. At mediations insurers could say we don't care if we

137 Participant 9.
138 Participant 5.
139 Participant 1.
140 Canterbury Earthquakes Insurance Tribunal Act 2019, s 47.
141 Section 47(2).
142 Participant 20.

> go to trial because costs don't affect us. If you lose in court, you are up to pay large costs – $100, $150, $200,000 in costs.

However, the advantage of the avoidance of costs awards was sometimes offset by the length of time that Tribunal cases could take to resolve, thus increasing the costs for claimants.

(d) Delay

Delay in resolving claims was a major problem that plagued the court system prior to the CES and the establishment of the CEIT. However, the hopes that the CEIT would lead to a dramatic improvement in the problems of delay proved overly optimistic. Delay in resolving disputes became a problem for the Tribunal almost from its inception. In its first six months of operation, it was clearly under-resourced and unprepared for the influx of claims that were filed. This meant delay became a feature of this new process intended to offer speedy dispute resolution. One participant described it as, "hopelessly bogged down",[143] at least in its first two years of operation. As a result, some participants were frustrated at a process that was too slow.[144] Comments from one participant were that "people are having to be engaged in another process which takes too long and costs too much" and this was "a major failing with the Tribunal".[145]

Other participants believed that the delay caused by the Tribunal made it as expensive as going through the court system.[146] One stated that a party was better off to go to the High Court because the costs are "pretty much the same. It's still unaffordable … but if you win you can get your expenses awarded".[147]

The delays in dispute resolution generally caused issues for claimants. However, it must be remembered there were a number of factors that contributed to delays in the CEIT. The Covid-19 pandemic in 2020 and the years following had a huge impact on the ability of the CEIT to function optimally. The disruption to operation delayed assessments, case management, hearings and other events which had to occur in a face-to-face context. The Tribunal made use of remote procedures (video conferencing and teleconferencing) where possible, however many of the technical experts used by the Tribunal, and most insurers, were domiciled outside of Christchurch and this presented significant challenges.[148]

Other reasons for delay have been identified. The first is the time it took for the parties to gather their evidence. This can take a lot of time and is dependent on the resources and workloads of experts and other third parties. These factors are outside the CEIT's control. Second, some experts took an adversarial approach to the case rather than trying to work constructively to ascertain the earthquake damage and the best repair methodology for addressing it. Third, the complexity of cases can cause delays in themselves. For example, cases where there are multiple parties and the division of liability must be determined between EQC/NHC, the insurer and the various subcontractors.[149]

143 Participant 2.
144 Participants 9, 10, 21 and 23.
145 Participant 9.
146 Participants 12, 14 and 21.
147 Participant 12.
148 Participant 7.
149 Participant 7.

(e) Certainty and consistency

As tribunals are dispute-focused, their decisions do not establish formal precedent and thus recording them is not seen as of the same importance as in formal courts of record. However, when a tribunal is acting in areas of uncertainty, tribunal decisions can be crucial to understanding how the law in a particular area is being applied. In the case of the CEIT, this has caused problems.

The Canterbury Earthquakes Insurance Tribunal Act 2019 requires every final written decision of the Tribunal to be published on a Ministry of Justice internet site, unless there is good reason not to publish it.[150] The main reason not to publish a decision or part thereof is if the decision is of limited public value.[151]

The publication of decisions allows for the development of informal precedents, which the Tribunal believed worked well.[152] However, it was noted that there was no system for bringing cases of interest and with precedential value to the public, so it was up to the Members to "flag" them to the Tribunal Chair to publish. However, the pressure of work on Tribunal members and lack of clear process meant that this system did not work effectively. As a consequence, the Members did not know the outcomes of cases of their fellow Members as there was no consistent process to share Minutes and decisions. One participant said this was an area in which improvements needed to be made.[153]

This criticism of the publication of decisions was widespread amongst users of the Tribunal and many felt that there were not enough published precedents to assist experts and homeowners as to how a specific case would be decided.[154] Such a lack of guidance from the Tribunal could have further added to the issue of delay as claimants, unaware of the way the Tribunal is interpreting particular disputes, would go to adjudication when the matters could have been settled prior.

(f) Tribunal membership

When the Tribunal was established, it was initially headed by a former Family Court Judge. Most understood the reasons for this decision was to ensure that someone with skills in more inquisitorial techniques and the use of mediation was managing the new Tribunal. It was felt that this was needed for disputes in a post-disaster settling where claimants were vulnerable and traumatised. However, despite the good intentions, many interviewees disagreed with this approach.[155]

A number of participants expressed the belief that the Tribunal's challenges were at least partially caused by those who were appointed to the panel of Tribunal Members. There were two main criticisms; the first that the Members did not have sufficient experience to do the specific tasks required of them.[156] Second, that some of the Members lacked expertise in insurance law, which some participants regarded as essential.[157] One participant tended to view Tribunal members negatively in comparison with those working as adjudicators for the GCCRS.[158] However, given that a number of the Members did and do have significant legal experience, it is not clear that this criticism is entirely

150 Canterbury Earthquakes Insurance Tribunal Act 2019, s 26.
151 Section 26(3)(b).
152 CEIT *Annual Report of the Canterbury Earthquakes Insurance Tribunal for the 12 months ended 30 June 2023.*
153 Participant 3.
154 Participants 9 and 21.
155 Note that these views are from those representing claimants, not the claimants themselves, who will be the subject of a future research project.
156 Participant 20.
157 Participants 10, 13, 14, 17, 21 and 22.
158 Participant 20.

justified.

Overall, the choice of non-insurance experts and a family court judge to head the Tribunal was controversial. However, given the procedural criticisms raised above, it is not clear to the authors of this report whether this was a key issue in the Tribunal's performance.

(g) The dominance of lawyers

Lawyers in New Zealand are trained to work in an adversarial system, not an inquisitorial one. Yet, as noted earlier, the CEIT was explicitly instructed to take an inquisitorial approach to the resolution of disputes to place the claimant at the centre of the process and thus reduce confrontation. Unfortunately, one of the main criticisms of the Tribunal was that allowing lawyers to represent parties within it undermined the client-centred, inquisitorial approach. This was also acknowledged by the CEIT itself.[159] A significant number of participants raised this as an issue for the Tribunal. One participant said: "As soon as you have lawyers being the dominant players they are going to default to the imprint of the culture of the legal system".[160]

The primary issue reported was that many lawyers did not seem to be able to adjust to the informal nature of the Tribunal. Lawyers reverted to their adversarial training which made it a more formal process and, as a consequence, proceedings became more litigious.[161] If it is treated like court litigation, then lawyers will use all the tactics that come with that process, including delay. One participant thought this behaviour was very disheartening:[162]

> [We] were concerned about access to justice and the well-being of our clients and then the lawyer on the other side … was trying to work the system to win rather than just engaging with the dispute.

The problem with the system being adversarial is that lawyers act for their clients as if in battle, in direct contrast with the inquisitorial model which attempts to find the "correct" or "fair" outcome. Legal counsel used procedural tactics to gain the best outcome for their client, rather than working towards the "correct" solution. This is clearly evident from the interviews. One participant noted:[163]

> We personally know of people who are engaged by insurers who are qualified in the law and who have absolutely applied the war policy. We have to find a way to deal with all of that. This is part of the power imbalance – playing these games. My personal view is that it was the lawyers more than the insurers who played these games – in the legal mindset to get the best for their client.

159 Annual Report of the Canterbury Earthquakes Insurance Tribunal (For the 12 months ended 30 June 2022) at [8].
160 Participant 1.
161 Participants 12, 23.
162 Participant 23.
163 Participant 9.

Another participant said they had spoken to chief executives of insurance companies who were keen to engage with the entities set up to resolve disputes. The problem was their lawyers did not want to and therefore created a barrier to the process.[164]

What is clear is the Tribunal could use its process to avoid lawyers increasing the formality of the proceedings. Unlike the High Court, the Tribunal has a degree of flexibility to address these issues through its ability to develop its own procedures. However, some participants expressed disappointment that it did not do so:[165]

> I'm not sure that a dispute resolution process in which lawyers are the dominant force will ever be effective. It takes a particular type of lawyer to stand back and say, well actually the best person to resolve this is a quantity surveyor, or two or three quantity surveyors or engineers, or whoever the other relevant professionals are [because] of the idea that lawyers are obsessed with good process which at the end is sometimes at the cost of good outcomes. The process which essentially insists on absolute comprehensiveness, effective in comprehensive rights of review or appeal at the appropriate junctures, appropriate pre-hearing steps … and all of those things can entirely counteract any effective dispute resolution.

Overall, the involvement of lawyers schooled in the adversarial system, and the failure of the Tribunal to adapt its procedures to address this, meant that attempts to create an inquisitorial, client-centred system were, at best, only partially successful.

(h) Summary

First, it must be acknowledged that participants were asked generally about their experiences of the CEIT from its inception to the date of their interviews. It may be that some participants' experiences of the Tribunal were within the first three years when the bulk of the cases were filed. Therefore, they may not have experienced the operation of the CEIT after procedural changes were made in 2022.

Overall, the majority of the participants considered that the idea of having a dedicated Tribunal as part of the post event dispute resolution system was a positive one. The intention of providing residential property owners with access to an effective remedy was sound. However, the operation of the CEIT in practice was a disappointment. The root of this disappointment seemed to be in the failure of the CEIT to provide an informal, quick process for dispute resolution. The procedural formalities caused delays and failed to address the power imbalance between the parties to the extent expected by most involved with the establishment of the Tribunal. In the views of the users of the Tribunal, the members failed to fully exercise their discretion to reduce procedural formality. As a result, the good intentions which underpinned the establishment of the Tribunal were undermined and problems of delay and cost continued to be an issue. It did not provide the informal, flexible, cost-effective and quick service that was envisaged as an alternative to the courts.

Nevertheless, despite the procedural criticisms that the Tribunal became a "mini-court", three counterpoints are worth noting. First, the Tribunal did succeed in achieving resolutions and settlements of disputes including some long-standing difficult disputes which, after all, was its ultimate aim. Therefore, in this sense, it did achieve what it was

164 Participant 8.
165 Participant 1.

set up to achieve.

Second, most participants felt that the Tribunal played an important role, despite its flaws, in providing a cheaper adjudicatory route. As a result, some participants noted that the outcomes were more favourable to claimants, as insurance companies who wished to avoid adjudication needed to consider that such a possibility did exist under the CEIT. Thus, the very existence of this body removed the "threat" of the High Court as a means for insurance companies to induce settlement.

Third, as those more involved in the Tribunal's decision making appear to recognise, although the Tribunal remained disappointingly formal to many, this was a relative judgement. In comparison with the High Court, for example, the procedures and rules of evidence utilised in the CEIT are far less onerous. In addition, it could be argued that expectations of informality were perhaps unrealistic in the New Zealand legal model, given the value of the assets under dispute. In New Zealand, when procedural formality is a fundamental feature of the formal courts, especially where decisions of high import and value are determined, it could be seen as quite natural that judges and lawyers, steeped in such a procedurally-focused system, would retreat to these norms when faced with highly complex and high value disputes in the CEIT.

Overall, therefore, the Tribunal was regarded as a success in terms of numbers of settlements achieved and by the provision of a form of accessible dispute resolution which was sorely lacking in the period after the CES. It also, by its very existence, provides an incentive to resolve the dispute. But most participants representing claimants found some aspects of the operation of the Tribunal a disappointment.

5. TRIBUNALS AS A MECHANISM FOR FUTURE POST-DISASTER DISPUTE RESOLUTION

New Zealand's current dispute resolution system makes a number of assumptions that work against claimants. First, it assumes a level of (legal) literacy and understanding and the ability to write well to state a case. Second, it assumes a level of financial resource to take a claim. Third, it assumes a level of mental and emotional strength and resilience. All of these assumptions are misplaced, especially so in the aftermath of a disaster.

The courts, tribunals and the FSDRS are the core dispute resolution services available for insurance disputes in the aftermath of a disaster. The CEIT was set up as a one-off entity to assist the courts with the resolution of outstanding insurance claims. The courts are primarily for the wealthy and well resourced – for big business. They are not well-suited to "mum and dad" homeowners. Their formal process means residential property owners require legal representation because it is foreign to most ("one shotters") which increases the cost. Other dispute resolution services such as the Disputes Tribunal and the FSDRS may be less expensive to users but they may not have jurisdiction for property disputes despite the recent increases.

Our research into the CEIT and where our research participants believe it fell short (especially prior to the changes made in 2022), suggests a number of key elements are required for an effective and efficient post-disaster dispute resolution system. Any future post-disaster dispute resolution entity should, as part of best practice, contain a number of features as set out below.

(a) The right to an effective remedy

Any dispute resolution system should aim to realise the right to an effective remedy. A rights-based approach to post-disaster dispute resolution will ensure effective access to justice for claimants alongside accountability by insurers. An effective remedy should be responsive to the diverse experiences and expectations of rights holders, including those who are vulnerable and marginalised. Any post-disaster dispute resolution system should have as its aim the realisation of the right to an effective remedy for individuals.

(b) Claimant-centred process

The dispute resolution service should be claimant-centred. This places the claimant at the centre of the process in every respect, with a focus on efficient and effective resolution of their claim. The approach to dispute resolution should be inquisitorial, with the aim to discover the facts, isolate the issues and find an appropriate solution. It should not be adversarial, pitting insurance companies against the insured in a battle which favours the well-resourced. To combat the power imbalance between the parties, the claimant should be assisted with legal and technical advice. The claimant should also have access to mental health support in a wrap-around service that meets the needs of individual claimants. Additional support should be available to vulnerable claimants.

(c) Specialist Forum

The dispute resolution service should be independent, impartial, effective and efficient. It should have expert case managers, mediators and decision-makers. It needs to be set up and operating efficiently in "normal times" so that its staff and processes are understood and operating effectively. It should also be well resourced to have the ability to "step it up" in times of crisis to deal with an influx of disputes in a short period. One participant had the idea of a general residential homes tribunal to deal with disputes of all kinds relating to residential property, as well as those arising from general insurance claims and those following a disaster.[166]

It is important that claimants have options for dispute resolution to meet their particular claim. However, in the past this has resulted in too many options of one kind and not enough of another. For example, mediation, negotiation and adjudication were available at EQC, GCCRS and the CEIT, as well as the option of private mediation and adjudication. This may have made it confusing to complainants who could not perceive the difference in each (other than by cost). Perhaps a more simplified system where each entity offers one of these options may be better.[167] Alternatively, another approach would be to provide one system that offers all options.

(d) Informal and Flexible Process

The dispute resolution process should be informal and flexible. The CEIT had the ability to be adaptable to deal with a large number of claims because it could create its own procedure (unlike the courts). This was a positive element and one of the key reasons the Tribunal was created but, in practice, this ability to innovate was not implemented as effectively as it might have been. Resolving this in future could require clearer procedures being established at the start of the process. In addition, there needs to be serious consideration of whether legal representation is compatible

166 Participant 22.
167 McKechnie, above n 10, also noted this point.

with the aims of an inquisitorial process. If an inquisitorial process is chosen to resolve the imbalance between the parties, then this may be best achieved by the parties themselves, with support, rather than legal representation.

(e) Compulsory Participation

A future dispute resolution forum must be established through legislation and compel all parties to attend. The threat of a determination forces the parties to focus on a resolution and settlement. Participants raised this as a criticism of the GCCRS. As it was not established through legislation, the insurers could choose not to attend.

(f) Test Cases

A future forum needs to be able to isolate issues that impact a number of claimants and refer them to the court as test cases early on. Decisions on the interpretation of insurance contracts are necessary to provide certainty for later claims. If the law is clarified early then advice can be given to subsequent claimants which will likely result in the settlement of disputes at an earlier stage. A suggestion is that the Government fund a number of test cases on such issues. For example, a court decision on the meaning of "as new" and "when new" in insurance contracts would likely have clarified the position for a number of claimants and reduced the number of disputes after the CES. One participant said it would have been very helpful if the case of ***Fitzgerald v IAG New Zealand***,[168] a case on this issue, had been decided in 2013 rather than 2018.[169] In their opinion it occurred far too late when it was a very important and influential decision. Furthermore, test cases that are needed should not be at an individual homeowner's. They should be funded by the Government for the benefit of all.

(g) Experts

The future forum should appoint independent experts to advise it on the property issues. Experts should be well-resourced and able to step up to meet the needs of a large number of claims after a disaster. They must be able to provide reports in a timely manner. The use of one expert appointed by the forum will free up experts for other cases as there will not be two or more being used on one case.

(h) Cost

A major problem for a large number of claimants was obtaining the money to take their claim to a resolution service. One participant argued that it would be money very well spent by the government if it provided a government-backed loan scheme for plaintiffs.[170] This person said there has been a lot of criticism of litigation funders and their margins of 20 per cent and higher (33 per cent being a common figure) who were only used because claimants had trouble funding their claims. The government could, for example, provide loans of $100,000 at 2 per cent interest for dispute resolution assistance, knowing the money would be repaid from the settlement proceeds.[171] This would give claimants more options for dispute resolution and level up the playing field between the repeat player, deep pocketed insurers and the one-shotter homeowners.

168 *Fitzgerald v IAG New Zealand* (2018) NZHC 3447.
169 Participant 20.
170 Participant 20.
171 Ibid.

6. CONCLUSION

The Canterbury Earthquake Sequence 2010/2011 caused significant widespread property damage across Canterbury that was unprecedented for Aotearoa New Zealand. While the majority of insurance disputes are now settled, there are still some outstanding over 13 years after the event. This is clear evidence the dispute resolution framework in place when the earthquakes occurred was ill-prepared to deal with the crisis that unfolded post-disaster.

The ideal solution is that no disputes arise post-disaster; that the pre-existing legal framework works so well that insurance claims are resolved before becoming disputes. It should therefore be emphasised that to resolve the insurance problems that beset the Canterbury Earthquake Sequence recovery requires reforms across the system as a whole. The government in its "Whole of Government Report: Lessons from the Canterbury Earthquake Sequence" noted, for example, that: "A single point of contact/end-to-end customer-centric approach improves the efficiency of insurance claims assessment and settlement, and creates a simpler experience for homeowners".[172] However, even if the number of disputes can be significantly reduced, there are always likely to be complex cases that will require dispute resolution. In the Canterbury case, the Government had no plan in place to resolve such issues other than through the existing system. This was insufficient.

As the above research makes clear, the delay in introducing a formal dispute resolution mechanism outside the courts was problematic. This meant that efficient and effective resolution of insurance claims and disputes in the aftermath of the CES did not occur. This negatively impacted the right to an effective remedy for residential property owners. Eight years after the CES, Government action finally led to the long overdue establishment of the Tribunal. This delay in establishing a specialist tribunal must not be repeated.

This report also makes clear that although there were a number of positive features of the Tribunal, it did not live up to expectations. While it was able to achieve resolution of many long-standing disputes, exhibited a degree of innovation in its procedures and provided a lower cost access to justice, many stakeholders found its processes less than optimal. In particular, the Tribunal was plagued by a level of formality that many deemed unnecessary, leading to delay and increased costs in resolving claims. In many ways, it came to operate like a court, the very system to which it was intended to provide an alternative.

Nevertheless, without the Tribunal to provide an adjudicative solution as an alternative to the High Court (in addition to its case management role), the other elements of the alternative dispute resolution landscape may not have functioned so effectively. Although the GCCRS has been widely seen as a success, this voluntary model of dispute resolution existed in the shadow of a useable adjudicative body, capable of enforcing an outcome on insurance companies. Thus, although the CEIT was not the panacea that many hoped it would be, its role needs to be seen in the context of the wider dispute resolution landscape. Together, this collection of systems comprising adjudication, mediation and advice, both compulsory and voluntary, eventually broke the logjam of insurance disputes. In a future event, Aotearoa New Zealand needs to learn from these experiences and legally prepare the mechanisms necessary. While the above research suggests that a tribunal in the form of the CEIT may not be the best model, an informal, low cost, speedy, adjudicative body outside the formal court system, is necessary to provide an accessible and effective remedy.

172 Greater Christchurch Group, Department of the Prime Minister and Cabinet *Whole of Government Report: Lessons from the Canterbury earthquake sequence* (2017) at 77.

In the final analysis the idea that a tribunal conceived in a post-disaster environment could itself deliver the informal and speedy dispute resolution asked of it, was too idealistic and unrealistic. Some cases involved complex questions around the nature of damage and repair methodologies. In many cases the value to homeowners was significant. As such, the above report argues that while the CEIT provided an imperfect, but useful, means of resolving post-disaster disputes, a much broader, holistic approach is required if lessons from the CES and its aftermath are to be properly learned.