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# Dispute resolution following natural disasters

**An examination of approaches used in New Zealand and  
overseas to resolve disputes after a natural disaster**

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## Executive summary

The key points discussed in this report:

- The need for better dispute resolution processes following natural disasters in New Zealand is evident following the Canterbury earthquake experience (which caused great damage and severe consequences).
- Issues surrounding the repair and rebuild of homes were exacerbated by the challenges faced in resolving insurance disputes. This tested the mechanisms that were in place to provide for post-natural disaster disputes.
- The main options available for dispute resolution are courts, tribunals, private settlement and various insurance complaints processes.
- There is potential for increased use of mediation to resolve disputes.
- There is a need for a more cohesive framework to be planned and ready-to-go should a disaster strike.
- Overseas jurisdictions, namely Australia, the United States of America and Japan, have established dispute resolution schemes following natural disasters. Lessons can be learned from the measures taken in overseas jurisdictions, mainly that measures should be put in place promptly and address both short-term and long-term options.
- Mediation schemes have been successful overseas and could be similarly successful in New Zealand. There are advantages and disadvantages to a mediation scheme, but the disadvantages can largely be mitigated by ensuring disputants have adequate legal representation.
- Any dispute resolution scheme should be in line with best practice principles and be user-focused and accessible, independent and fair, efficient, effective and accountable.
- A scheme should be overseen by a central organisation to ensure it is well coordinated and efficient.
- Having a specialist court list for natural disaster-related disputes would promote access to justice.
- Ideally, a scheme would give disputants the option to escalate disputes if necessary. Many disputes would settle in early stages (that is, at mediation), but parties could go to a tribunal or to court if necessary.
- Planning a dispute resolution scheme, that comes into force in the event of a natural disaster, would support disaster recovery.

# 1 Introduction

Natural disasters are an unfortunately inevitable occurrence in New Zealand. In 1991, the Law Commission observed that “a major natural disaster, particularly a disastrous flood or a severe earthquake, is the most likely civil defence emergency of national proportions that New Zealand might experience”.<sup>1</sup> Since then, New Zealand has seen floods and earthquakes causing severe damage.

Canterbury University law professors Jeremy Finn and Elizabeth Toomey note that New Zealand law makes little provision for the consequences of natural disasters.<sup>2</sup> This is surprising given the frequency of natural disasters in New Zealand.

Natural disasters are becoming increasingly common due to the effects of climate change: it is reasonable to anticipate that “environmental disasters will become more widespread, severe, impactful, costly and common”.<sup>3</sup> New Zealand should strive to be prepared for the consequences of future natural disasters – including for the disputes that will inevitably arise.

For the purposes of this report, a “natural disaster” is a natural event that causes damage or loss of life.<sup>4</sup> This includes earthquakes, tsunamis, volcanic eruptions, storms, forest fires, geothermal activity and landslides.<sup>5</sup>

This report provides:

- an overview of the types of disputes that arise in the aftermath of natural disasters
- an examination of what has been done in New Zealand and overseas to resolve disputes following natural disasters
- analysis of possible dispute resolution options to address post-natural disaster disputes, informed by best practice principles.

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<sup>1</sup> Law Commission *Final Report on Emergencies* (NZLCR 22, 1991) at 9.35.

<sup>2</sup> Jeremy Finn & Elizabeth Toomey *Legal Response to Natural Disasters* (Thomson Reuters, Wellington, 2015) at 2.

<sup>3</sup> Kenneth Cloke “Conflict, Climate Change and Environmental Catastrophe: How mediators can help save the planet” (2011) 12(2) *Cardozo Journal of Conflict Resolution* 307 at 307.

<sup>4</sup> This reflects the Oxford English Dictionary definition.

<sup>5</sup> ‘Storms’ including tropical cyclones.

## 2 Background – New Zealand and natural disasters

The biggest test of New Zealand’s response to natural disasters in recent years came with the 2010/2011 Canterbury earthquakes. Many challenges arose in the aftermath and during the recovery efforts, which continue to this day. Some of the disputes arising following these earthquakes remain unresolved.

This report focuses primarily on the Canterbury earthquakes to illustrate the New Zealand framework for resolving disputes following a natural disaster, as this is the most significant natural disaster New Zealand has faced. The more recent Kaikōura earthquake will also be discussed to examine how dispute resolution processes have developed. It should be kept in mind that the situation following the Canterbury earthquakes is relatively unique from a global perspective. Almost all damaged residential buildings in Christchurch were privately insured, resulting in claims in relation to 167,677 dwellings.<sup>6</sup> To put this in context, Hurricane Andrew striking Florida left around 250,000 people homeless, but there were only about 25,000 insurance claims made. Differences between New Zealand and other jurisdictions are discussed further in section 5 of this report.

The Canterbury earthquakes of September 2010 and February 2011, plus the related aftershocks, caused devastating and widespread property damage.<sup>7</sup> The second earthquake was more severe and exacerbated damage caused by the first earthquake. The damage was unprecedented. In 2009 the Earthquake Commission (EQC) was advised to plan for a “large-scale event”.<sup>8</sup> The Canterbury earthquakes were over five times the size of this.<sup>9</sup> Overseas experience indicated EQC would only need to respond to a single event, but the Canterbury earthquakes were comprised of 14 claim generating events and thousands of aftershocks.<sup>10</sup> This demonstrates how unpredictable natural disasters can be, and that it is important to prepare for the unexpected. While most insurance disputes arising from the Canterbury earthquakes are now settled, it has been over seven years since the earthquakes. Canterbury residents are frustrated with how long it has taken to get claims settled.<sup>11</sup> Part of the reason insurance disputes took so long to resolve was due to the EQC system, where a claim is only transferred to a private insurer once EQC has assessed that it is over their \$100,000 cap.

Following the Kaikōura earthquake, claims were settled more quickly. This was partly due to a change to how EQC dealt with claims.<sup>12</sup> EQC signed a memorandum of understanding with private insurers, who would assess the entire claim, and then claim from EQC – so claims were cash settled instead of EQC carrying out repairs. Also, the Kaikōura earthquake was also on a much smaller scale, with insurance claims of \$2.115 billion compared to Christchurch’s \$33

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<sup>6</sup> Ministry of Justice *Options for resolving remaining Canterbury earthquakes insurance disputes* (13 December 2017) CRT-48-01 at 3.

<sup>7</sup> Finn and Toomey, above n 2, at 1.

<sup>8</sup> Earthquake Commission *Planning for Loss or Complexity?* (October 2016) at 9.

<sup>9</sup> Earthquake Commission, above n 8, at 9.

<sup>10</sup> At 9.

<sup>11</sup> Empowered Christchurch “An open letter to the Minister of Justice: Appeal for access to justice for Canterbury earthquake claimants” (5 January 2018) <[www.empoweredchristchurch.co.nz](http://www.empoweredchristchurch.co.nz)>.

<sup>12</sup> Conan Young “Kaikōura quake: EQC closes in on full settlement” (14 November 2017) Radio New Zealand <[www.radionz.co.nz](http://www.radionz.co.nz)>.

billion.<sup>13</sup> This demonstrates some improvement since the Christchurch earthquakes, but there is still a need to improve access to dispute resolution. The fact the government is looking at establishing an earthquake tribunal for the remaining Canterbury claims over seven years after the event demonstrates improvement is necessary. Having a dispute resolution system developed and at the ready would be useful for any future natural disasters.

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<sup>13</sup> Insurance Council of New Zealand “The Cost of Natural Disasters in New Zealand” <[www.icnz.org.nz](http://www.icnz.org.nz)>.

### 3 What kinds of disputes arise out of natural disasters?

This section provides an overview of the kinds of disputes that generally tend to arise following natural disasters, based on previous New Zealand and overseas experience. Natural disasters bring chaos and disorder capable of causing issues in many areas of life and law.

#### Initial issues

After a natural disaster, the initial focus will be on coping with the emergency on a basic level, focusing on immediate needs. Issues may arise initially around employment, employment insurance, emergency food and water supplies, and accommodation and tenancy issues.<sup>14</sup> Access to information will be crucial in preventing issues from becoming problematic and preventing disputes from arising. Access to legal advice allows people facing issues to understand their rights. Quality legal advice encourages people to have reasonable expectations of what should be done to remedy a potential dispute.

Immediately after a major disaster, it may be difficult to access legal advice. The aftermath of the Canterbury earthquakes was an understandably chaotic time, and this is reflected in legal issues and disputes that arose. Finn and Toomey note that access to legal advice and information was an issue, particularly for those more vulnerable.<sup>15</sup> Comments from lawyers suggest that following the Canterbury earthquakes, lawyers had to advise on areas they were not entirely familiar with, and give advice at very short notice.<sup>16</sup>

Outside of these pressing issues, it may take some time before conflict situations to “ripen”,<sup>17</sup> or for disputes to arise. For example, after making an insurance claim and having it denied. Or, upon needing to break a lease in a commercial tenancy and realising it is unclear whether one is able to do so. Specific types of disputes are discussed in more detail in the latter of this section.

#### Unpredictability of natural disasters and disputes

Different types of natural disasters may cause different issues, and issues will also depend on the severity of the disaster. For example, houses deemed “uninhabitable” after an earthquake may have suffered structural damage. This is very different to what may be “uninhabitable” if a volcano erupted – where houses may be structurally sound, but uninhabitable due to ash covering the neighbourhood. It is preferable to plan for disasters that are most likely to occur, in order to avoid as many disputes as possible.

It may be easier to plan for natural disasters where they are foreseeable. For example, floods are likely to affect low lying coastal areas or catchment zones by rivers, and it is possible to predict heavy rainstorms with some notice.<sup>18</sup> Finn and Toomey note that floods give rise to a

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<sup>14</sup> Finn and Toomey, above n 2, at 58.

<sup>15</sup> At 46.

<sup>16</sup> At 40-43.

<sup>17</sup> Maria Volpe “Post Disaster ADR Responses: Promises and Challenges” (2014) 26 Fordham Environmental Law Review 95 at 126.

<sup>18</sup> Finn and Toomey, above n 2, at 77.

smaller range of legal issues than earthquakes and less litigation.<sup>19</sup> This is mainly due to floods being more foreseeable, and because the Building Act makes it difficult get a permit for construction/renovation on land which is subject to natural hazards such as flooding, storm surge or tidal effects.<sup>20</sup> There is no equivalent for any land that may be earthquake-prone. They also note Parliament’s guidelines for what will happen in flood situations e.g. following the flooding of rental accommodation and EQC’s cover for flooding.<sup>21</sup>

However, many natural disasters are not foreseeable. Geologists can monitor seismic activity, and understand which earthquakes are more likely to hit, but cannot provide notice of a severe earthquake striking. It is possible to monitor volcanic activity, but this only provides very short notice of a volcano erupting. There is not the same certainty as with flooding that low-lying land *will be affected* if there are heavy rainfalls. The uncertainty of natural disasters raises challenges in planning for their consequences.

Khouri observes that the unpredictability of natural disasters means they will “often raise new issues of law, such as how certain provisions in insurance policies are to be interpreted in the special circumstances of the particular disaster”.<sup>22</sup> For example, whether property damage following Hurricane Katrina was caused by wind or flood, and what this meant for homeowners whose insurance policies excluded flood damage.<sup>23</sup> While New Zealand has learned a lot about disaster recovery and handling insurance claims/disputes from the Canterbury earthquakes, a different kind of natural disaster may cause very different issues.

Following a natural disaster, disputes may arise in the areas of law discussed below. Insurance is the most significant area, where disputes are far more common than in other areas of law. Other areas of law will therefore be discussed in less detail. This paper focuses on civil law areas, as areas appropriate for dispute resolution between individuals, rather than between an individual and the Crown. There will however be a need for increased police and criminal law responses to natural disasters if crime rates increase following a disaster. The section below on family law notes that police callouts for domestic violence can increase following a natural disaster. Following the Canterbury earthquakes, total recorded crime fell, but total reported family violence offences rose.<sup>24</sup>

## Insurance

Following natural disasters that cause damage to land and property, people will make insurance claims. Their insurance company may dispute the amount of coverage the insured is entitled to, the nature or scale of the damage, the repair that is required and/or the costs to do this. This is essentially the basis of most insurance disputes. The majority of disputes following the Canterbury earthquakes were between insurers and property owner policyholders.<sup>25</sup> The dispute may be over technical or legal issues. Common technical issues include whether certain

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<sup>19</sup> Finn and Toomey, above n 2, at 79

<sup>20</sup> At 79.

<sup>21</sup> At 79.

<sup>22</sup> Nina Khouri “Civil Justice Responses to Natural Disaster: New Zealand’s Christchurch High Court Earthquake List” (2017) 36(3) Civil Justice Quarterly 316 at 328.

<sup>23</sup> Khouri, above n 22, at 328.

<sup>24</sup> Paul Bellamy “Social Effects of Canterbury Earthquakes” (Parliamentary Research Paper, September 2014).

<sup>25</sup> Khouri, above n 22, at 344.

damage was in fact caused by the natural disaster, or what kind of repairs are required to fulfil the terms of the policy. An example of this is where the insurer's view is that "jack and pack" repairs are sufficient, i.e. the house is raised and foundations are repaired, but the homeowner contends that new foundations are needed.<sup>26</sup> Legal issues may arise around the interpretation of the policy, and what it means for the situation at hand. For example, in a case where a policy offered the "full replacement cost", the Court of Appeal found that this included the full replacement cost *and* additional costs i.e. contingency/professional fees, reversing the High Court's decision on the matter.<sup>27</sup> The Supreme Court upheld the Court of Appeal's decision.<sup>28</sup>

Insurance issues following the Canterbury earthquakes were particularly pronounced, as the law did not anticipate some of the issues that arose, e.g. what coverage was available when property was damaged, repaired, and damaged again. Furthermore, multiple events "within and between consecutive insurance policy years" were not accounted for in EQC legislation, leading to uncertainty.<sup>29</sup> Dealing with claims arising from multiple events also caused operational challenges to insurers' claims handling process.<sup>30</sup>

The aftermath of the Canterbury earthquakes was described by a barrister as the "first time in a major way that insurance (in both statutory and common law) has really been under focus ... the sheer diversity of circumstances is starting to throw up some questions which haven't needed to be addressed at all".<sup>31</sup>

## Construction

After receiving insurance payouts, property owners will usually want repair work carried out on their homes, or a full rebuild. Construction will also often be directly linked to insurance, as insurers may pay for and coordinate repairs being carried out.

Disputes may arise relating to construction (i) as it is carried out, (ii) shortly after, if it is not done to a sufficient standard, or (iii) in the future, as issues arise or as a house is sold. Issues have arisen in this area with houses repaired following the Canterbury earthquakes – where repairs have been discovered in later years to be insufficient, of poor quality, or problems were not detected at the time. Often this happens when homeowners decide to sell their house and get an inspection done, or when new owners purchase the home and discover faults.

In some cases, cash settlements may not have been sufficient to complete full repairs or to get repairs done to standards that satisfied homeowners. Owners may have been forced to sell these properties and move on. This has an enduring effect on the quality and volume of housing stock following a disaster.

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<sup>26</sup> Interview with Insurance Mediator (the author, 18 December 2017).

<sup>27</sup> *Avonside Holdings Ltd v Southern Response Earthquake Services Ltd* [2014] NZCA 483.

<sup>28</sup> *Southern Response Earthquake Services Ltd v Avonside Holdings Ltd* [2015] NZSC 110.

<sup>29</sup> Earthquake Commission, above n 8, at 11.

<sup>30</sup> At 10.

<sup>31</sup> Finn and Toomey, above n 2, at 50.

## Employment law

In the uncertain aftermath of a serious natural disaster, many businesses will not operate as usual and issues may arise relating to employment. Finn and Toomey indicate that employment law issues affected many people in the wake of the Canterbury earthquakes.<sup>32</sup> Issues arose around the termination of employment – whether employers had to provide work to employees, and whether an employee could be considered to have abandoned employment.<sup>33</sup> The Employment Relations Authority held that a fair and reasonable employer could properly have regarded the February 2011 earthquake as creating such uncertainty about a business’ prospects that reducing staff numbers by way of redundancy was a fair and reasonable thing to do.<sup>34</sup> Issues also arose around occupational health and safety issues, regarding the reoccupation of damaged buildings.<sup>35</sup>

## Family law

Research indicates the likelihood of a significant increase in family law issues following natural disasters.<sup>36</sup> Any issues with separation, divorce, or parenting arrangements may be compounded by forced relocations and other life disruptions caused by a natural disaster.<sup>37</sup> Difficulties may also be further exacerbated by psychological stress stemming from the disaster. In the months after the Canterbury earthquakes, there was a “huge spike” in custody issues around relocation.<sup>38</sup> Police estimate reported incidents of domestic violence also rose during this time, by about 50 percent.<sup>39</sup> The divorce rate also rose, from 211 per 100,000 in 2010 to 249 in 2011 and 261 in 2012.<sup>40</sup>

## Contract law

A natural disaster may invoke force majeure clauses in contracts. Also, the circumstances following a natural disaster may mean parties are unable to perform contractual obligations, leading to issues around frustration of contract.<sup>41</sup> Contractual issues may also arise between property owners, particularly in the case of Multi-Unit Buildings (MUB). In Christchurch, the majority of MUBs were cross-lease arrangements.<sup>42</sup> These cross-leases generally have mandatory private arbitration clauses to manage disputes between owners. Claims related to MUBs are also generally more complex and consequently more difficult to settle. They tend to involve more complex structures to repair or rebuild, multiple insurers, and often have complicated shared ownership arrangements. The prevalence of large apartment buildings in cities like Auckland and Wellington would likely present significant challenges if they were affected by a disaster.

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<sup>32</sup> Finn and Toomey, above n 2, at 110.

<sup>33</sup> At 110.

<sup>34</sup> At 116.

<sup>35</sup> At 110.

<sup>36</sup> At 102.

<sup>37</sup> Melissa Lombreglia “The Calm After the Storm: using mediation to resolve parenting disputes in the wake of natural disasters” (2008) 46(2) Family Court Review 395 at 395.

<sup>38</sup> Finn and Toomey, above n 2, at 105.

<sup>39</sup> At 105.

<sup>40</sup> Bellamy, above n 24.

<sup>41</sup> Finn and Toomey, above n 2, at 153.

<sup>42</sup> MBIE *Repairing and rebuilding multi-unit residential buildings: A guide to homeowners in Canterbury* (April 2015) at 6.

## Tenancy and commercial leases

Issues may arise around occupation of a building damaged in a natural disaster. A commonly used standard form lease provides for a lease to terminate if the building is damaged to the extent that it is untenable.<sup>43</sup> In a residential tenancy, this might involve a dispute between landlord and tenant over whether a house should be considered “uninhabitable”. Rights and obligations are made clear under the Property Law Act 2007. Rent will abate while premises are uninhabitable or unfit for occupation.<sup>44</sup>

## Media law

Reporting on natural disasters may involve footage of people’s suffering, vulnerability and grief, particularly at the scene of a disaster. This can raise media law issues, particularly in balancing the public interest in the disaster with individuals’ right to privacy.<sup>45</sup> Following the Canterbury earthquakes, complaints were made to the Press Council and Broadcasting Standards Authority, but were all resolved informally; no legal actions were brought for a breach of privacy.<sup>46</sup> This is largely credited to the special privacy guidelines issued to media following the earthquakes.<sup>47</sup> In future, there may be more issues in this area, due to the increasing prevalence of social media. Actions may be brought against individuals for sharing images or videos on social media, rather than against traditional media sources.

## Tax law

The Canterbury earthquakes even “shone the spotlight on a number of tax issues”, mainly related to the tax treatment of money recovered from insurance claims.<sup>48</sup>

## Discussion of issues arising

While natural disasters evidently cause a wide range of issues, disputes occur in some areas far more frequently than in others. The volume of insurance/construction disputes will far outweigh disputes in other areas.

Due to the requirement for compulsory natural disaster insurance in New Zealand, about 90 percent of houses have insurance coverage.<sup>49</sup> If damage is widespread, the majority of people affected by a natural disaster will be claiming under their insurance policies. This cannot be said about any of the other areas discussed above. For example, in relation to family law – it is not a given that everyone’s families will be affected by issues relating to divorce, removal of children in breach of care arrangements. Another example is with media law, i.e. while issues could arise around people being filmed at the scene of a disaster – this will not be widespread as insurance issues are.

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<sup>43</sup> Finn and Toomey, above n 2, at 86.

<sup>44</sup> At 86.

<sup>45</sup> At 95

<sup>46</sup> At 96.

<sup>47</sup> Ursula Cheer and Sarah Rosanowski “The Impact of Law on Media Reporting of Earthquakes in Christchurch 2010-2011” (2013) 18(3) Media & Arts Law Review 220 at 237.

<sup>48</sup> Finn and Toomey, above n 2, at 166.

<sup>49</sup> Earthquake Commission *Briefing to the Incoming Minister* (December 2011) at 27.

The vast majority of dispute resolution occurring after natural disasters will be in relation to insurance/construction issues. The High Court set up a special Earthquake List for “earthquake-related cases” – all of which were insurance and construction disputes. The List is discussed in section 4 of this report. In Australia, following the 1989 Newcastle earthquake, the Newcastle City Council’s Renewal Coordination Unit identified four *key areas* where disputes occurred:<sup>50</sup>

1. Insurance – including disputes over earthquake damage, non-earthquake damage, secondary damage, frustrations;
2. Building – including disputes relating to the quality of work, unfinished work, obtaining tradespeople;
3. Contracts – including disputes regarding post-earthquake purchases and application of funds; and
4. Regulatory – including disputes relating to Council regulations.

These are the areas where disputes most commonly occurred, though the vast majority (84 percent) of enquiries made to the Renewal Coordination Unit’s mediation service related to insurance issues.<sup>51</sup>

There is also great importance in resolving insurance and construction disputes. Insurance plays “an integral role in recovery” from natural disasters because claimants need to settle claims to commence the rebuilding process.<sup>52</sup> Where people are unable to get insurance payouts they may be unable to pay for repairs to their homes, leaving them in substandard living conditions. Their quality of living may be significantly impeded during the time it takes to resolve a dispute, causing great stress. The Canterbury District Health Board noted.<sup>53</sup>

Access to housing is a basic human need. There is also growing recognition that good-quality affordable housing is essential for strong communities. ... Poor-quality or overcrowded housing can affect people’s mental and physical health.

In the Canterbury Earthquake Recovery Authority’s (CERA) 2012 Wellbeing Survey, 51 percent of respondents reported having to live in a damaged home.<sup>54</sup> There were, and are, significant market pressures affecting housing affordability and availability, particularly in the rental market.<sup>55</sup> Demand was increased by the relocation of households from the red zone and from houses that cannot be repaired or rebuilt, households requiring accommodation while their houses are repaired/rebuilt and the arrival of the workforce assisting with rebuild/recovery

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<sup>50</sup> Newcastle Renewal Coordination Unit *Earthquake Renewal - The Newcastle Experience: 1990-1993 Report of the Newcastle and Region Renewal Coordination Unit* (1995), Volume 5, at 11. The Newcastle earthquake experience is discussed further in Section 5 of this report.

<sup>51</sup> Newcastle Renewal Coordination Unit, above n 50, at 11.

<sup>52</sup> Bobby Marzine Harges “Disaster Mediation Programs – Ensuring Fairness and Quality for Minority Participants” (2011) 39 *Capital University Law Review* 893 at 904.

<sup>53</sup> Canterbury District Health Board “Canterbury Wellbeing Index: Housing affordability and availability” (September 2016) at 1.

<sup>54</sup> Canterbury DHB, above n 53, at 1.

<sup>55</sup> At 2.

efforts.<sup>56</sup> The estimated population loss due to migration from the greater Christchurch area between June 2010 and 2012 was 9,200 people, or 2 percent, which was lower than the loss of housing stock.<sup>57</sup>

The government undertook initiatives to help with the housing issues, through MBIE, CERA, the Ministry of Social Development, Housing New Zealand, the Christchurch City Council and the Canterbury Earthquake Temporary Accommodation Service. Notwithstanding this, the issues with housing demonstrate how important it was to provide efficient responses to insurance disputes, so rebuilding and repair work could begin. In the September 2012 CERA Wellbeing survey, 37 percent of respondents reported that dealing with insurance issues negatively impacted their daily lives (decreasing to 13 percent by 2015).<sup>58</sup> Housing is an important issue, with a strong impact on people's lives. Resolving insurance/construction issues should be a key priority following a natural disaster, supported by effective dispute resolution.

Experiencing a natural disaster is a highly stressful event for many people. Otago University research indicates that those who experienced serious adversity following the earthquakes and their consequences were 40 percent more likely than people living outside the region to have at least one disorder such as major depression, post-traumatic stress disorder or anxiety disorder.<sup>59</sup> It appeared that "the psychological impact of the quakes could have been worse if community spirit were not so strong".<sup>60</sup> Having to go through the litigation process following a natural disaster can become a source of secondary trauma.<sup>61</sup> This should be kept in mind when considering disputants' needs and the kinds of dispute resolution options that should be available.

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<sup>56</sup> At 2.

<sup>57</sup> MBIE "Housing pressures in Christchurch: A Summary of the Evidence" (March 2013) at 3.

<sup>58</sup> Canterbury District Health Board "Canterbury Wellbeing Index: Housing affordability and availability" (June 2015) at 2.

<sup>59</sup> Bellamy, above n 24.

<sup>60</sup> Bellamy, above n 24.

<sup>61</sup> See Brent K. Marshall, J. Steven Picou and Jan R. Schlichtmann "Technological Disasters, Litigation Stress, and the Use of Alternative Dispute Resolution Mechanisms" (2004) 26(2) Law & Policy 289.

## 4 How are these disputes addressed in New Zealand?

This section will examine the dispute resolution options available for those involved in disputes following a natural disaster. This draws largely on the Canterbury earthquake experience, as the most significant recent natural disaster in New Zealand. The Canterbury earthquakes tested the mechanisms that were in place to provide for post-natural disaster disputes and demonstrated the need for changes in this area.

### Courts and tribunals

Disputants may wish to litigate the issue they are facing. Following a natural disaster, the court system may be under pressure due to the volume of disputes caused by the event. Furthermore, court resources may have been affected by a disaster occurring. Court buildings may be damaged, and staff may be unavailable. Finn and Toomey's surveys of lawyers indicate immense frustration with the delays in getting the court system running effectively following the Canterbury earthquakes. In the United States, many courts have a strategy in place for how they would cope with a natural disaster.<sup>62</sup> This may include a plan for alternative spaces in which to hold hearings.

Following the Canterbury earthquakes, increased pressure on the court system became an issue. This was predominantly an issue with the High Court, concerning insurance/construction disputes. There does not appear to have been a flood of claims in any area other than insurance/construction, though court statistics for 2011 note increased cases in relation to coronial services due to earthquakes.<sup>63</sup> There is no indication that the District Court or the Disputes Tribunal received significantly more claims than usual. The number of active criminal cases in the District Court increased, but this was because of a lack of facilities, rather than an increase in cases.<sup>64</sup> The lack of facilities meant wait times for hearings were longer. The Earthquake List created to take pressure off the courts was for insurance and construction disputes only.

The Employment Relations Authority (ERA) would likely have received a flood of claims, was it not for the measures taken by the government to assist employers with paying staff. The Earthquake Support Package provided a subsidy to employers and the self-employed of \$500 per week for each full-time employee, if their businesses were affected i.e. could not operate or experienced significant loss of trade.<sup>65</sup> A job loss cover of \$400 per week was provided to employees displaced due to the earthquakes.<sup>66</sup> Finn and Toomey note this was "instrumental" in discouraging workplace disputes, as it gave employers and employees time to examine their

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<sup>62</sup> Finn and Toomey, above n 2, at 65-66.

<sup>63</sup> Courts of New Zealand "Annual statistics: Specialist Courts and Tribunals December 2011" <[www.courtsofnz.govt.nz](http://www.courtsofnz.govt.nz)>.

<sup>64</sup> Courts of New Zealand "Annual statistics for the District Courts December 2011" <[www.courtsofnz.govt.nz](http://www.courtsofnz.govt.nz)>.

<sup>65</sup> Finn and Toomey, above n 2, at 117.

<sup>66</sup> At 117.

options and negotiate agreements.<sup>67</sup> This assistance supported people, preventing the major disruption to their lives that lack of income may have created. The ERA already experienced delays due to the earthquakes affecting its capacity to resolve cases.<sup>68</sup> Without this government assistance, the ERA could have been overwhelmed.

For a number of people, litigation may be too expensive an option for resolving their disputes. Some litigation funding arrangements were created to enable homeowners to bring claims. For example, Earthquake Services provides advocacy and litigation funding, operating on a “no win, no fee” basis.<sup>69</sup>

Class actions are another avenue of litigating at a lesser cost. The Court of Appeal granted leave for a claim against Southern Response to proceed as a class action.<sup>70</sup> Class actions are uncommon in New Zealand – mainly due to the lack of rules for bringing such a claim.<sup>71</sup> This case involving Southern Response sets a precedent, clarifying the law around representative actions. Class actions may become more common in New Zealand and may be helpful in future for post-natural disaster issues.

## Dispute resolution options for insurance issues

While disputes may arise in various areas, insurance is the biggest issue, as well as the area where specialist dispute resolution options have arisen. The following dispute resolution options were used to deal with insurance disputes in the wake of the Canterbury earthquakes.

### The High Court Earthquake List

The High Court’s Earthquake List (the List) was developed to provide access to justice more efficiently for earthquake-related cases, as well as facilitating private settlement. The majority of cases settle before trial, but this is very difficult where the law is unclear, and natural disasters often raise new questions of law.<sup>72</sup> Khouri observes that natural disasters often lead to a high volume of civil claims with similar legal and factual issues, whereas usually, courts would not deal with similar cases repeatedly within a short space of time.<sup>73</sup> Disputes following a natural disaster are particularly suited to a system where novel cases are litigated, so others can settle based on these precedents. The List selected cases with precedent value for early judgment, and a public online spreadsheet provided a record of cases before the court.<sup>74</sup> Parties were therefore able to settle their disputes in the shadow of the law.

The List also encouraged settlement of cases where proceedings had already commenced. Justice Kós observed:

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<sup>67</sup> At 117.

<sup>68</sup> At 117.

<sup>69</sup> Earthquake Services “We are on your side” <[www.earthquakeservices.co.nz](http://www.earthquakeservices.co.nz)>.

<sup>70</sup> See *Southern Response Earthquake Services Limited v The Southern Response Unresolved Claims Group* [2017] NZCA 489.

<sup>71</sup> Liesle Theron “Class action litigation: a new frontier” *LawTalk* (New Zealand, 28 April 2014).

<sup>72</sup> Khouri, above n 22, at 328.

<sup>73</sup> At 328.

<sup>74</sup> At 319.

A core aspect of the List’s purpose, by encouraging early identification of issues, exchange of expert reports, caucusing of experts and exchange evidence, is to make parties face up to the strengths and weaknesses of their cases sooner than normal. When they do so, they seldom need to go to trial.<sup>75</sup>

At case management conferences, the decision could be made to try discrete issues separately.<sup>76</sup> This encourages efficiency where there is a legal question that does not require much evidence and can be heard sooner.<sup>77</sup> The List made it compulsory for the parties to appear at case management conferences in person, so they could engage with each other, compare objectives and “reality test”.<sup>78</sup> This also provided the opportunity for catharsis and clearing up any misunderstandings.<sup>79</sup>

The List introduced a special protocol for conferral between experts, who were required to provide a joint report to the court with a common cost template.<sup>80</sup> Being able to easily compare the differing opinions of experts saves “significant time and expense at trial”.<sup>81</sup> Discussions between experts take place privately. This encourages “non-adversarial candour”, and promotes the experts’ obligation to the court over any obligation to the client instructing them.<sup>82</sup> This prevents a “battle of the experts”,<sup>83</sup> rather, encouraging a mutually acceptable and principled outcome.<sup>84</sup>

The scheduling of the List cases was also done to promote settlement. The court docket was “loaded” to 300 percent of capacity, so hearing dates could be scheduled sooner.<sup>85</sup> This gamble paid off: cases settled, and there were no adjournments for lack of a judge.<sup>86</sup>

The List encourages private settlement, and it streamlines court processes for more efficient trials where public adjudication is required. Khouri observes that the rate of EQL cases being settled increased exponentially, as the number of judgments decreased, suggesting the List is successful in facilitating settlement.<sup>87</sup> Cases also proceed to trial faster than the national average, at 325 days, rather than 2080.<sup>88</sup> While it is difficult to establish whether settlements are *just*, in addition to being efficient, Khouri suggests they likely are. Cases are settling in the shadow of the law – with settlement increasing following the judgments.<sup>89</sup> Parties will usually

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<sup>75</sup> Stephen Kós J “Disaster and Resilience: The Canterbury earthquakes and their legal aftermath” (speech to the Supreme and Federal Courts Judges Conference, Brisbane, 26 January 2016).

<sup>76</sup> Khouri, above n 22, at 331.

<sup>77</sup> At 331.

<sup>78</sup> At 331.

<sup>79</sup> At 331.

<sup>80</sup> At 333.

<sup>81</sup> At 333.

<sup>82</sup> At 334.

<sup>83</sup> Interview with Insurance Mediator (the author, 18 December 2017).

<sup>84</sup> Khouri, above n 22, at 334.

<sup>85</sup> Khouri, above n 22, at 336.

<sup>86</sup> At 342.

<sup>87</sup> At 341.

<sup>88</sup> At 341-342.

<sup>89</sup> At 342.

only agree to a settlement if they think it is fair – though there may be some other concerns encouraging them to settle.

This indicates the List was largely successful, however there are some issues to note. The List was arguably not as efficient as it could have been because it took some time to get underway, being established in May 2012. Further, it was time-consuming to identify which cases had precedent value and should be prioritised on the List.<sup>90</sup> There were also delays associated with the requirement for expert evidence. A University of Otago study of the justice system notes “many cases require input from structural engineers, geotechnical engineers, building practitioners, and quantity surveyors”, who were in “short supply” after the earthquakes.<sup>91</sup>

### Private settlement

Private settlement offers parties autonomy and freedom in how they resolve their disputes. Parties favour private settlement mainly because it is quicker and cheaper than litigation.<sup>92</sup> It is beneficial that many cases settle this way, and prevents strain on the court system. Sander saw the benefit of settlement and alternative dispute resolution (ADR) to “reserve the courts for those activities which they are best suited and to avoid swamping and paralysing them with cases that do not require their unique abilities”.<sup>93</sup>

Private settlement through negotiation and mediation is notoriously difficult to measure.<sup>94</sup> Many cases will settle before litigation is commenced. Others are settled after litigation has been commenced, but before trial, as can be seen with the Christchurch Earthquake List cases. This issue with measuring settlement rates does not arise in government-run mediation schemes, where reporting can be required.

Another issue with private settlement is that agreements may not always be just. While parties have to agree to a settlement, they may not be doing so because they are completely happy with it, but because they have no other options. Following the Canterbury earthquakes, a “substantial number” of people cash settled insurance disputes because they could not afford litigation in the High Court.<sup>95</sup> Private mediation may also be expensive. It is problematic if people have to settle due to lack of other options, and indicates an issue with access to justice.

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<sup>90</sup> Bridgette Toy-Cronin, Bridget Irvine, Kayla Stewart and Mark Henaghan *The Wheels of Justice: Understanding the Pace of Civil High Court Cases* (University of Otago Legal Issues Centre, 2017) at 75.

<sup>91</sup> Toy-Cronin, above n 90, at 75.

<sup>92</sup> See Grant Morris *New Zealand Commercial Mediation Study: Grant Morris and Daniella Schroder “Part 1: Commercial Mediation in New Zealand Project Report”* (Research Paper, Victoria University of Wellington/LEADR, 2015); Grant Morris and Amanda Lamb “Part 2: Lawyers as Gatekeepers to Commercial Mediation in New Zealand Report” (Research Paper, Victoria University of Wellington/Resolution Institute, 2016); Grant Morris and Freya McKechnie “Users of Commercial Mediation in New Zealand – Insurance Industry Report” (Research Paper, Victoria University of Wellington/Resolution Institute, 2017).

<sup>93</sup> Judith Resnik, “Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication” (1995) 10 *Ohio State Journal on Dispute Resolution* 211 at 217.

<sup>94</sup> See Morris, above n 92.

<sup>95</sup> Empowered Christchurch, above n 11.

## Insurance complaints processes

Insurance companies have internal complaints processes that will be used when customers have complaints.<sup>96</sup> If the complaint is not resolved, the complainant may go to an external dispute resolution scheme.<sup>97</sup> Insurers are required to belong to an external dispute resolution scheme, with most belonging to the **Insurance and Financial Services Ombudsman (IFSO)**. These schemes take complaints from individuals or small organisations,<sup>98</sup> over a disputed value of less than \$200,000. This service is free for policyholders and is funded by the member insurance companies. The schemes “investigate complaints and try to resolve them by negotiation or mediation where possible”.<sup>99</sup> Essentially, this process is a fusion of investigation and conciliation with a determination – and is not what is usually considered mediation. The schemes will make a recommendation that is binding on the insurer. If claimants are not satisfied with this, they may continue to another ADR process or to court.

The IFSO scheme has received 1821 Canterbury earthquake-related enquiries since 2011, 192 of which it has investigated.<sup>100</sup> According to the scheme's statistics, earthquake-related complaints are settled more often than all complaints across the industry. Between 2011 and February 2017, 44 percent of earthquake-related complaints were settled, upheld, or partly upheld, compared to 30 percent of claims generally. Evidently, these schemes are helpful, but many disputes will be over the \$200,000 threshold. Disputes may also be highly complex, requiring the input of technical experts and engineers, rather than a general investigation. These schemes are industry-funded, and therefore not objectively independent. They may not be seen as independent from the perspective of claimants.

EQC also has a system in place for disputes. Complaints can be made to an **EQC Resolution Specialist**.<sup>101</sup> If this does not resolve the complaint, EQC provides a mediation service, funded by EQC and administered by the Arbitrators’ and Mediators’ Institute of New Zealand (AMINZ).<sup>102</sup> The service is free, but participants will have to pay the costs of any expert opinions i.e. from a lawyer, engineer or assessor.<sup>103</sup> Only 46 complaints were referred to mediation in the first year of this scheme operating, and by the third year, only 14. This is surprising, given the number of complaints lodged with EQC: 23,000 between 2010 and 2015.<sup>104</sup> This indicates that EQC is not encouraging the use of mediation.

Further complaints about EQC can be made to the **Parliamentary Ombudsman**. The Ombudsman investigates, forms an opinion and makes a recommendation to EQC.<sup>105</sup>

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<sup>96</sup> Insurance Council of New Zealand “Making a Complaint” <[www.icnz.org.nz](http://www.icnz.org.nz)>.

<sup>97</sup> Insurance Council of New Zealand, above n 96.

<sup>98</sup> A small organisation is defined as one with 19 or fewer full-time employees. See Insurance Council of New Zealand, above n 96.

<sup>99</sup> Insurance Council of New Zealand, above n 96.

<sup>100</sup> Jamie Small “Canterbury earthquake repair issues increasing for insurance ombudsman” *Stuff* (online ed, New Zealand, 24 March 2017).

<sup>101</sup> Earthquake Commission “How to make a complaint to EQC” (16 February 2018) <[www.eqc.govt.nz](http://www.eqc.govt.nz)>.

<sup>102</sup> Earthquake Commission “EQC Mediation Service” (9 October 2017) <[www.eqc.govt.nz](http://www.eqc.govt.nz)>.

<sup>103</sup> Earthquake Commission, above n 102.

<sup>104</sup> Georgina Stylianou “More than 23,000 EQC complaints lodged” (28 July 2015) Radio New Zealand <[www.radionz.co.nz](http://www.radionz.co.nz)>.

<sup>105</sup> Ombudsman “Complaining about state sector agencies” <[www.ombudsman.parliament.nz](http://www.ombudsman.parliament.nz)>.

Recommendations are not binding, but will usually be accepted.<sup>106</sup> The Office of the Ombudsman’s 2011/2012 annual report indicates 389 complaints received in relation to EQC, compared to 72 complaints the year before.<sup>107</sup> The Office of the Ombudsman undertook an investigation of EQC and made recommendations on how to address issues, including streamlining EQC’s processes and improving the quality of information and service provided through increased training and guidance.<sup>108</sup>

Insurance companies established the **Residential Advisory Service (RAS)** in May 2013, for homeowners having difficulties with getting their earthquake-damaged homes repaired or rebuilt.<sup>109</sup> RAS is now fully funded by MBIE. RAS offers independent legal advice, provided by Community Law Canterbury, and “second-opinion” technical advice, provided by RAS’ panel of experts, that is, structural engineers, quantity surveyors and geotechnical engineers.<sup>110</sup>

RAS also offers a brokering service. Homeowners discuss their claim with a broker, who can call a round-table meeting of the key people involved in the claim. This may include the homeowner, their quantity surveyor and earthquake support coordinator, the insurer, who may be represented by a case manager who has authority to settle and a loss adjustor.<sup>111</sup> Essentially, the broker facilitates a meeting between homeowner and insurer. The brokers are not ADR specialists.<sup>112</sup> RAS does not help with deficient repair disputes where insurers cash settled and did not have a role in the repairs, narrowing the scope of people they can assist.

## Analysis

There are a number of different options for disputants. On one hand, this is helpful – there are different options for different disputes. People can select a process based on the characteristics of a dispute. Higher value disputes may warrant a more expensive process, while smaller claims may require the cheapest, simplest option. However, this results in the DR landscape being rather splintered. Instead of having e.g. EQC mediation, private mediation, RAS meetings, it would be simpler and more efficient to have a single mediation scheme.

Currently, mediation has not been used to its full potential. There has been little take-up under the EQC scheme, the financial dispute resolution schemes use investigation/conciliation and RAS uses facilitation. There is potential for increased use of mediation to resolve insurance disputes following a natural disaster in New Zealand. The amount of time taken to resolve disputes following the Christchurch earthquakes demonstrates that the measures in place were not sufficient, though it should be noted that not all options were available from the outset. The options have been underused, but their delivery was delayed. This can impact on effectiveness, as over time positions become entrenched and trust is eroded. There is a need for a better framework to be planned and in place, should another natural disaster strike.

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<sup>106</sup> According to the Ombudsman, though this is in relation to government agencies generally, rather than EQC specifically. Ombudsman, above n 91.

<sup>107</sup> Ombudsman “EQC under scrutiny from Ombudsman” (press release, 27 September 2012).

<sup>108</sup> Ombudsman and the Privacy Commissioner *Information fault lines: Accessing EQC Information in Canterbury* (December 2013) at 6.

<sup>109</sup> Ministry of Justice, above n 6, at 4.

<sup>110</sup> Ministry of Justice, above n 6, at 4.

<sup>111</sup> Residential Advisory Service “Case Studies” <[www.advisory.org.nz](http://www.advisory.org.nz)>.

<sup>112</sup> See Residential Advisory Service “Meet our team” <[www.advisory.org.nz](http://www.advisory.org.nz)> and Breakthrough Services “About us” <[www.breakthroughservices.co.nz](http://www.breakthroughservices.co.nz)>.

## 5 What has been done in other jurisdictions to address disputes arising out of natural disasters?

### Conflict management: Providing advice and preventing conflict

Short-term disaster response efforts are relevant to dispute resolution – providing support to those in need helps them to deal with any issues. Providing access to assistance and resources helps to prevent disputes from arising. A number of approaches have been used successfully in various jurisdictions that could be adapted for use in New Zealand.

#### Australia

Following the 2009 Victoria Bushfires, various community groups formed a central organisation, Bushfire Legal Help. Having a central organisation meant people had somewhere to go to for help in the stressful aftermath of the bushfires. The organisation provided advice in many areas, such as issues with wills and estates, destroyed property, insurance entitlements and disputes, bushfire class action costs agreement, and commercial transactions that had been disrupted by the bushfires.<sup>113</sup> This legal advice and help eased some of the stress of the victims, helping them to deal with issues that otherwise could have become overwhelming and led to disputes.

The organisation notes the “speedy resolution of financial, employment, housing and rebuilding problems can help avoid a downward cycle into unemployment, debt and financial hardship”.<sup>114</sup> Having practical and material needs met is crucial for recovery, to avoid stress and mental health issues.<sup>115</sup>

#### United States

State Bar Associations may provide or train volunteers to assist victims of natural disasters. The New Jersey State Bar Association’s (NJSBA) mass disaster response programme sources volunteer attorneys to “provide information to victims, answer legal questions and advise them not to make hasty decisions on important matters”.<sup>116</sup> Having information on one’s situation may help prevent disputes. This programme was put in place following 9/11. While not a natural disaster, the events of 9/11 raise many of the same issues due to the destruction caused. The NJSBA also provides information by creating and distributing advisory handbooks. Following Superstorm Sandy, the NJSBA provided volunteer training, as it was difficult to find enough volunteers with expertise in the areas of high demand, i.e. tenancy and insurance issues.

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<sup>113</sup> Victoria Legal Aid *Legal assistance and community recovery after the 2009 Victorian bushfires: the Bushfire Legal Help response* (March 2010) at 2.

<sup>114</sup> Victoria Legal Aid, above n 97, at 2.

<sup>115</sup> See Victorian Government Department of Human Services *After the bushfires: Victoria’s psychosocial recovery framework* (2009).

<sup>116</sup> Finn and Toomey, above n 2, at 61.

After Hurricane Katrina hit there was high demand for legal advice, particularly regarding issues over housing and insurance matters, and family law disputes i.e. child custody.<sup>117</sup> Community law centres and volunteer law clinics run by universities helped to meet this demand.

Dispute resolution practitioners also provide assistance. For example, working in Federal Emergency Management (FEMA) disaster field offices, providing workplace conflict resolution and prevention services.<sup>118</sup> Following 9/11, DR practitioners helped to run large-scale facilitation “Listening to the City” events.<sup>119</sup> After Hurricane Katrina, “community congresses” were held to address the Unified New Orleans plan, with DR practitioners helping to facilitate.<sup>120</sup>

## Dispute resolution

After the initial aftermath of the disaster, disputes tend to arise. The high volume of cases following natural disasters threatens to put pressure on the courts. Australia, the United States and Japan have all created ADR-based schemes to deal with post-disaster disputes. Mass disaster mediation schemes are established primarily to deal with insurance claims.<sup>121</sup> This section examines various natural disasters and the schemes implemented to deal with the subsequent disputes.

### Australia

#### *Newcastle earthquake (1989)*

The earthquake that struck Newcastle in 1989, causing over \$4 billion in damage, is one of Australia’s most severe natural disasters. The Newcastle City Council formed the Newcastle and Region Renewal Co-ordination Unit (‘RCU’) to manage the recovery efforts.

The RCU established a mediation scheme to assist the community with their disputes. Of the inquiries for assistance made to the Unit, 84 percent related to disputes with insurers, 5 percent construction disputes. Ten percent of cases were classed as “other” and included problems with regulatory authorities.<sup>122</sup> The other 1 percent related to a community joint venture construction project.<sup>123</sup> The mediation scheme received 1224 inquiries, opened 553 cases, and successfully resolved all but one of these cases.<sup>124</sup> Individuals, insurance companies and regulatory bodies appreciated the existence of an alternative to costly litigation. Having a less adversarial process was highly effective in resolving disputes.

There is a risk of potential power imbalance in disputes between the homeowners and insurance companies, but the RCU found mediation helped with this: “The principal safeguard of a fair outcome is the skill of the mediator who not only serves as a check against

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<sup>117</sup> Finn and Toomey, above n 2, at 50.

<sup>118</sup> Volpe, above n 17, at 119.

<sup>119</sup> At 111.

<sup>120</sup> At 111.

<sup>121</sup> Elizabeth Baker Murrill “Mass Disaster Mediation: Innovative ADR, or a Lion’s Den?” (2007) 7(3) *Pepperdine Dispute Resolution Law Journal* 401 at 404.

<sup>122</sup> Newcastle Renewal Coordination Unit, above n 50, at 20.

<sup>123</sup> This model is useful in coordinating rebuild efforts following natural disasters. See the Newcastle Renewal Coordination Unit’s report for further information.

<sup>124</sup> Newcastle Renewal Coordination Unit, above n 50, at 16.

intimidation, but acts as an agent of reality and an impartial promoter of reasonableness.”<sup>125</sup> It was common for insurance companies to call in engineers to dispute all or part of a client’s claim, by providing extremely lengthy and detailed reports, which included professional denigration of others i.e. the homeowner’s chosen engineer or builder. This left homeowners confused and feeling powerless. The mediator questioned the use of these tactics, as being “partisan and adversarial rather than aimed at sorting out conflicting professional opinions in the interests of all the parties involved”.<sup>126</sup> While a mediator must act as a neutral party, this questioning of tactics checks the insurer, without the mediator acting as an advocate for the homeowner.

The RCU used three different mediation formats:<sup>127</sup>

1. “Periodic”: sessions held at regular intervals.
2. “Marathon”: a single session lasting until parties come to an agreement.
3. “Crisis”: a single session of short duration dealing only with the crisis issue/s.

This approach is flexible, providing parties with a means of mediation best suited to their particular dispute: i.e. “marathon” being appropriate for more complex disputes, permitting those involved to fully explore all issues, options, consequences.

This mediation programme can be considered highly effective, with the RCU resolving all but one of 553 cases. There do not seem to be other comparable schemes to this one in Australia, though perhaps if another major earthquake struck, a similar programme would be established. This is a contrast to the United States, where such schemes have become very common, and are essentially standard practice after a natural disaster.

## United States

### *Agent Orange tort claim (1980)*

The response to the Agent Orange mass tort claims was one of the first instances of using mediation as a response to mass litigation following a disaster.<sup>128</sup> This is not a case related to a natural disaster, but it similarly involved a large number of civil claims, testing the capacity of the justice system.<sup>129</sup>

Military veterans filed claims against the chemical companies that produced Agent Orange for injuries caused by exposure to the chemicals. These claims were heard as a mass tort claim, similar to a class action lawsuit. Weinstein J, presiding over the case, thought it best that the case be settled.<sup>130</sup> Litigating the case would take a long time; with appeals and possible retrials, it could have taken years before a verdict was reached.<sup>131</sup> This would have been expensive –

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<sup>125</sup> Newcastle Renewal Coordination Unit, above n 50, at 13.

<sup>126</sup> At 15.

<sup>127</sup> Newcastle Renewal Coordination Unit, above n 50, at 15.

<sup>128</sup> Volpe, above n 17, at 113.

<sup>129</sup> Khouri, above n 22, at 318.

<sup>130</sup> Alexis Abboud "In re Agent Orange Product Liability Litigation (1979-1984)" (10 April 2017) Embryo Project Encyclopedia <[www.embryo.asu.edu](http://www.embryo.asu.edu)>.

<sup>131</sup> Peter H. Schuck *Agent Orange on Trial: Mass Toxic Disasters in the Courts* (Harvard University Press, Cambridge, 1987) at 143.

furthermore, there was a risk that the veterans would not be able to establish causation. Settlement offered a more certain prospect that the claimants would receive compensation.<sup>132</sup>

Weinstein J recruited lawyers to plan and negotiate a settlement. Weinstein J oversaw the settlement negotiations, acting as mediator and final decision maker.<sup>133</sup> His approach was successful in reaching a settlement, but he has been accused of going too far to coerce settlement.<sup>134</sup>

The settlement reached was the largest mass tort settlement in US history – but less money than what a jury may have awarded.<sup>135</sup> However, claimants were guaranteed to receive the money, without having to prove requisite causation, which would have been required in court. As part of the settlement agreement, the defendants disclaimed liability. This was frustrating for claimants, many of whom felt the chemical companies did not accept blame. As such, this settlement was problematic, but can be seen as successful in securing compensation for the victims.

This settlement “gave rise to the notion of mass DR settlement as a means of relieving pressure from the court to process the large volume of cases resulting from specific actions, including those following disasters”.<sup>136</sup>

#### *Hurricane Andrew, Florida (1992)*

Hurricane Andrew caused an estimated \$30 billion worth of damage, leaving 250,000 people homeless and giving rise to about 25,000 insurance claims. The Florida Department of Insurance and the AAA created a claims resolution program, processing 2,400 claims, 92 percent of which were settled within one year.<sup>137</sup>

The programme was insurer-funded, for residential claims only, optional for homeowners but mandatory for insurers.<sup>138</sup> The insurance companies were obligated to inform policyholders of their right to mediate. Mediation took place without counsel.

The success of this programme led to “a whole new area of mass disaster mediation practice for mediators”.<sup>139</sup> The scheme’s success made it a template for future programs and led to the establishment of permanent insurance mediation programs in NY, Florida and California.<sup>140</sup>

#### *Hurricane Iniki, Hawaii (1992)*

Hurricane Iniki hit soon after Hurricane Andrew, causing around \$1.6 billion of damage. The state’s Department of Commerce and Consumer Affairs and Centre for Alternative Dispute

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<sup>132</sup> Schuck above n 131, at 143.

<sup>133</sup> See Schuck, above n 131, for a detailed explanation of the proceedings.

<sup>134</sup> Schuck above n 131, at 163.

<sup>135</sup> Schuck above n 131, at 163.

<sup>136</sup> Volpe, above n 17, at 113.

<sup>137</sup> Murrill, above n 121, at 404.

<sup>138</sup> Mark Kelly “Mediation schemes for natural disaster insurance disputes – a better way for the future?” (paper presented to the APAC Insurance Conference, Singapore, 18 October 2017).

<sup>139</sup> Volpe, above n 17, at 115.

<sup>140</sup> Murrill above n 121, at 405.

Resolution established a mediation programme similar to the one following Hurricane Andrew, with claims handled by the AAA.<sup>141</sup>

Of note is the community outreach involved: Town meetings were held throughout Kauai to educate the community about mediation and address their concerns.<sup>142</sup> Access to information is crucial for victims of natural disasters, and a solid understanding of mediation enables homeowners to participate effectively in the process.

#### *Northridge earthquake, California (1994)*

The 6.7 magnitude earthquake that struck Northridge, California, in 1994 caused about \$42 billion in damage and displaced over 20,000 people from their homes.<sup>143</sup> The AAA oversaw a voluntary ADR programme to assist the California Department of Insurance in resolving claims. This offered more options than the programs following Hurricanes Andrew and Iniki. Participants could choose “dispute evaluation and assessment, mediation, binding arbitration, and non-binding arbitration”.<sup>144</sup>

The insurance mediation scheme established has since been codified, and has been available for disputes ever since – but there does not seem to have been much take-up.<sup>145</sup> Nor has the scheme been invoked in a disaster situation since, but there may have been other reasons for this. According to the California Department of Insurance, at this time 33 percent of residential homes had insurance with earthquake coverage included.<sup>146</sup> In 2017, just over 10 percent have earthquake coverage.<sup>147</sup> Participation in this scheme may remain low with this level of insurance coverage. Nevertheless, it is beneficial that a framework is in place if needed.

#### *Hurricanes Charley, Frances, Ivan and Jeanne, Florida (2004)*

The four major hurricanes that struck Florida in 2004 caused immense damage, with insurance companies receiving over 2.5 million claims.<sup>148</sup> Recognising the unresolved claims’ potential to inundate the court system, the Florida State Insurance Commissioner was prompted to create an insurance mediation program.<sup>149</sup>

Insurers funded the programme, and they had to give claimants notice of their right to mediation and other available options.<sup>150</sup> Participants were instructed about the programme and its process through a video.<sup>151</sup> Either party could object to the mediator chosen by an administrator.<sup>152</sup> Experts could appear such as engineers, architects, and contractors – though

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<sup>141</sup> Murrill above n 121, at 405.

<sup>142</sup> Kelly, above n 138.

<sup>143</sup> Michael Martinez “Six things we’ve learned since 1994 Northridge Earthquake” (8 September 2014) CNN <[www.edition.cnn.com](http://www.edition.cnn.com)>.

<sup>144</sup> Murrill above n 121, at 405.

<sup>145</sup> Kelly, above n 138.

<sup>146</sup> James F. Peltz “Few Californians have earthquake insurance, but interest has jumped since the Mexico quakes” *Los Angeles Times* (online ed, Los Angeles, 2 October 2017).

<sup>147</sup> Peltz, above n 146.

<sup>148</sup> Harges, above n 52, at 900.

<sup>149</sup> Mel Rubin “Disaster Mediation: Lessons in Conflict Coordination and Collaboration” (2008) 9 *Cardozo Journal of Conflict Resolution* 351 at 360.

<sup>150</sup> Rubin above n 149, at 361.

<sup>151</sup> At 361.

<sup>152</sup> At 362.

lawyers were not usually present.<sup>153</sup> This raises the issue of there being a power imbalance, with a large insurance company versus individual homeowners, who may not have legal representation or advice.

The mediators were paid on a case-by-case basis rather than an hourly rate, and commonly worked 3-4 mediations per day.<sup>154</sup> Rubin notes that “traditional mediator techniques and processes were trimmed to address the immediate need for homeowners to begin the rebuilding process”.<sup>155</sup> Though, time constraints could be removed – allowing more time for sessions, continuations or multiple sessions.<sup>156</sup> This is arguably a pragmatic approach, where there are many disputes waiting to be mediated. It is a delicate balance between promoting efficiency, and ensuring fair and just resolution of claims.

If the parties reached an agreement, this would be drawn up based on a standard form document created by Department of Finance Services, which provided “certain non-negotiable rights to the insured, including a window of escape”, similar to a cool-down period.<sup>157</sup>

If a settlement was not achieved, the ADR process moved into an appraisal phase, described as “an informal process and a modified arbitration proceeding”.<sup>158</sup> Selected appraisers from each side choose an impartial third party to act as an umpire. This provides the claimants with another option before having to go to litigation.

The residential claims programme was considered so successful that a commercial component was added.<sup>159</sup> Commercial claims were usually given greater attention due to the issues being more complex, and parties usually had legal representation.

### *Hurricanes Katrina and Rita, Louisiana and Mississippi (2005)*

Hurricane Katrina was one of the most destructive hurricanes in U.S. history, and the damage caused was exacerbated when Hurricane Rita struck less than a month later. This made it the most costly natural disaster in U.S. history.<sup>160</sup> An emergency mediation programme was necessary because, as the volume of claims would have overwhelmed the ordinary system for insurance claims. The programme handled 12,241 cases, with an 80 percent settlement rate.<sup>161</sup>

This programme was not renewed, but presumably if another natural disaster hit, an equivalent programme would be established. It appears the Louisiana Department of Insurance supports creating an insurance mediation programme that would apply to all property insurance claims, not just those resulting from natural disasters.<sup>162</sup>

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<sup>153</sup> Rubin above n 149, at 362.

<sup>154</sup> At 361.

<sup>155</sup> At 361.

<sup>156</sup> At 361.

<sup>157</sup> At 361.

<sup>158</sup> At 362.

<sup>159</sup> At 361.

<sup>160</sup> Robert H. Jerry “Dispute Resolution, Insurance, and points of convergence” (2015) *Journal of Dispute Resolution* 255 at 263.

<sup>161</sup> Jerry, above n 160, at 263.

<sup>162</sup> Jerry, above n 160, at 267.

### *San Diego Wildfires (2007)*

After wildfires struck San Diego, over 5000 plaintiffs (including insurance carriers and underwriters) filed lawsuits against San Diego Gas & Electric.<sup>163</sup> The court-annexed mediation programme established to deal with these claims resulted in 98 percent of the cases settling.<sup>164</sup>

This programme is similar to the settlement process used for the Agent Orange tort claims as discussed above. The judge who oversaw the programme had the ability to select cases for binding mediation, and there was a group of lawyers who managed the cases.<sup>165</sup> One of the mediators observed that this “localised” the process, and made settlement more likely, in that mediators were able to see patterns evolving of how certain issues got resolved.<sup>166</sup> Previous settlements provided precedent for later cases, making the process more efficient.<sup>167</sup> This should be regarded with some caution, as mediated settlements cannot be treated as precedent in the way a court decision is. Though, previous settlements may simply provide mediators with an idea of what the parties are likely to think is reasonable. The mediator involved notes that “you can start to project outcomes and cases may settle directly without even reaching mediation ... we started to resolve three to seven cases a week on the phone”. From this, it seems the “mediation” employed by this programme may have been closer to conciliation.

### *Hurricane Sandy (2012)*

During the twenty years since Hurricane Andrew and the first specialist insurance mediation programme, these schemes had become commonplace: “By the time Hurricane Sandy occurred, the question was no longer whether insurance mediation programs would be introduced post hurricane disasters, but when.”<sup>168</sup>

A state-organised mediation programme was created for homeowners and business owners, to be administered by the American Arbitration Association.<sup>169</sup> This was modelled on the programmes the AAA had run following Hurricanes Katrina and Rita.

This scheme resulted in a 64 percent settlement rate.<sup>170</sup> Insurers were required to participate in and pay for all mediations where claimants decided to participate.<sup>171</sup> Although insurers had to go to mediation, they may not have had much interest in making a genuine effort to settle.<sup>172</sup> This may be behind the relatively low settlement rate.

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<sup>163</sup> John T. Pardun “How ADR Can be Used to Resolve Mass Disaster and Insurance Claims” (2013) JAMS <[www.jamsadr.com](http://www.jamsadr.com)>.

<sup>164</sup> Pardun, above n 163.

<sup>165</sup> Pardun, above n 163.

<sup>166</sup> Pardun, above n 163.

<sup>167</sup> Pardun, above n 163.

<sup>168</sup> Volpe, above n 17, at 117.

<sup>169</sup> Nancy Kramer “Storm Sandy Cases – Mediation Like No Other” (December 2013) Mediate.com <[www.mediate.com](http://www.mediate.com)>.

<sup>170</sup> Kramer, above n 169.

<sup>171</sup> Kramer, above n 169.

<sup>172</sup> Kramer, above n 169.

The settlement rate may also be due to the fact that mediations were limited to two hours. Kramer indicates this was “enough time for most cases” due to the limited scope of issues.<sup>173</sup> Having a limited scope of issues prevented mediators from “enlarging the pie”, and there were no real alternatives to monetary relief.<sup>174</sup> The fact that there was no meaningful pre-existing relationship between the parties also made sessions shorter.<sup>175</sup> While this scheme aims for efficiency in settling disputes, participants could have benefitted from discussing issues and interests in greater depth.

Issues arose in relation to power imbalance. Many claimants appeared without counsel and may not have been able to afford litigation.<sup>176</sup> Mediators “wound up trying to level the playing field”.<sup>177</sup> It is understandable that mediators may sympathise with a vulnerable party, but this should not compromise their role as a third-party neutral. A better way of preventing a power imbalance would be to ensure both parties have legal representation. Government assistance through legal aid would be necessary if parties were required to have legal representation.

## Japan

### *Earthquake, tsunami and Fukushima Nuclear disaster (2011)*

The earthquake that struck East Japan in 2011 caused a tsunami, which led to a system failure at the Fukushima Nuclear Power Plant and the release of radioactive material. Japanese law provides holds nuclear power operators strictly liable for damages where a nuclear reactor accident such as this occurs.<sup>178</sup> Claims for damages would be filed against Tokyo Electric Power Company (TEPCO) – and it was anticipated that the number of claims would overload the courts.<sup>179</sup>

The Nuclear Damage Claim Dispute Resolution Centre was established to mediate these claims, with no power to adjudicate or arbitrate.<sup>180</sup> This “mediation” is different from mediation in a traditional sense. Claimants file reports based on a structure provided by the centre, reports are sent to TEPCO, and TEPCO provides a response.<sup>181</sup> After receiving a response from TEPCO, the mediator holds hearings, listening to both parties’ opinions and receives further submissions and evidence. Thereafter, the mediator makes a settlement proposal. This is the typical process, though there are many cases where the mediator provides a settlement proposal without a hearing.<sup>182</sup> The mediation proceedings are private, but the resulting settlement can be made public. This process is actually one of non-binding arbitration as opposed to mediation.

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<sup>173</sup> Kramer, above n 169

<sup>174</sup> Kramer, above n 169

<sup>175</sup> Kramer, above n 169

<sup>176</sup> Kramer, above n 169.

<sup>177</sup> Kramer, above n 169.

<sup>178</sup> Naoki Idei *The Nuclear Damage Claim Resolution Center* (Japanese Commercial Arbitration Association, Newsletter No. 28, September 2012) at 1.

<sup>179</sup> Idei, above n 178, at 1.

<sup>180</sup> At 1.

<sup>181</sup> At 2.

<sup>182</sup> Idei, above n 178, at 2.

This is described as “rule-oriented ADR” – the mediator applies standards and gives a non-binding agreement, rather than promoting compromise and agreement among the parties.<sup>183</sup> This approach has been criticised for not allowing claimants’ emotional release or allowing TEPCO to express accountability.<sup>184</sup> It is heavily rights-based and relies on rules. Japan has little tradition of facilitative mediation, which is more party centred and provides more room for collaboration.<sup>185</sup> Although this approach is efficient, it does not have the benefits of mediation. Through facilitative mediation, parties have greater opportunity to work together, add value, and also undergo a more cathartic experience. However, this approach may be favoured in Japan as more appropriate for a hierarchical and rule-focused society.

## What can be learned from measures taken in these jurisdictions?

### Measures should address both short-term and long-term issues

These measures taken overseas in response to natural disasters demonstrate the importance of having assistance in place for both short-term issues, and more long-term disputes. At first, victims of a natural disaster may require information and legal advice. In the weeks or months following, disputes may arise that people require help resolving. A framework for dispute resolution following a natural disaster should address these needs.

### Measures should be put in place promptly

Dispute resolution programmes are most effective when implemented soon after the disaster. As noted in Australia, having a “team of specialist mediators set in place as soon as practicable after a disaster would enable quick resolution of many disaster-related disputes before those disputes escalate and perhaps become intractable, and socially debilitating”. Programmes are most helpful when they are ready to go in the event of a disaster, to avoid any delays associated with implementing a new programme or even renewing an old one.<sup>186</sup> Ideally, legislation should be in place, providing for a dispute resolution framework to be set up following a natural disaster.

### Applicability to New Zealand

Examining how other jurisdictions deal with issues arising out of natural disasters provides some guidance for New Zealand. Mass mediation insurance mediation schemes have been highly successful in the United States. It seems that such a scheme adapted for the New Zealand context would be similarly successful here. A key difference between the United States and New Zealand is how widespread insurance coverage is. As noted, Hurricane Andrew gave rise to about 25,000 insurance claims, whereas the Canterbury earthquakes gave rise to around 170,000. If anything, this makes insurance mediation schemes even more crucial in New Zealand. The insurance rate in Japan is also low, with about 14-17 percent of homes having insurance, though this is partly because the Japanese government provides a significant amount of publicly funded insurance.<sup>187</sup>

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<sup>183</sup> Idei, above n 178, at 2.

<sup>184</sup> Luke Nottage and Joel Rheuben “Resolving Claims from the Fukushima Nuclear Disaster” (26 January 2015) Japanese Law in Asia-Pacific Socio-Economic Context <[www.blogs.usyd.edu.au/japaneselaw](http://www.blogs.usyd.edu.au/japaneselaw)>.

<sup>185</sup> Nottage and Rheuben, above n 184.

<sup>186</sup> David L. Lane “The storm is just beginning when the hurricane finally ends: applicability of mediation to settlement of insurance claims in mass disasters” (2009) American Journal of Mediation at 7.

<sup>187</sup> John W. Schoen “Insurance industry well-shielded from Japan quake” (16 March 2011) <[www.nbcnews.com](http://www.nbcnews.com)>.

The dispute resolution programme following the San Diego wildfires based settlement expectations on previous settlements in order to resolve disputes efficiently. However, this could probably be better achieved in the New Zealand context through having a mediation programme complemented by a specialist list in the High Court. This would provide precedent and indicate what is reasonable, so that mediation could take place in the shadow of the law.

## Effectiveness of insurance mediation programmes

Overseas programmes indicate that mediation schemes can be effective in getting claims settled. As noted above, settlement rates are high. However, the quantity of claims settled is not the only, or even key, indicator of success. The quality of the settlements is important. If disputes are not resolved effectively the first time, more issues may arise down the track. Critics argue that the high settlement rate “comes at the cost of a fair settlement and at the cost of homeowner satisfaction”.<sup>188</sup> It may be difficult to strike a balance between getting claims settled quickly *and* fairly. Mediation schemes may be effective at getting claims settled, though there are some potential issues that should be noted.

## Key advantages and disadvantages of mediation schemes

### Advantages

#### Time/cost

Mediation is less time-consuming and less expensive than litigation is. This is of particular importance with insurance/construction disputes. It is crucial for claimants resolve their insurance disputes so that they can begin to repair or rebuild their homes, and move on with their lives.<sup>189</sup>

#### Flexibility

Mediation is a far more flexible process than litigation. The process can be designed or altered to suit the parties and the dispute, e.g. spacing the sessions out for timing purposes, or having mediation sessions to address discrete issues separately. Mediation does not have strict procedural requirements like litigation does regarding evidence and filing of documents in court. There is also flexibility in remedies available, more so than what is available as a remedy from the courts. This offers participants the potential to “enlarge the pie”. The ability to adapt the mediation process to suit the parties’ needs helps to make parties feel more satisfied with the process.

#### Access to justice

A mediation scheme gives claimants an easily accessible forum, promoting access to justice. Without such a programme, claimants may be left with few other options: accepting the insurer’s offer, which may not be equitable or wise, or litigating the claim, which may be too expensive or time-consuming.<sup>190</sup> Mediation is particularly helpful for post-natural disaster “

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<sup>188</sup> Harges, above n 52, at 893.

<sup>189</sup> Murrill above n 121, at 409.

<sup>190</sup> Harges, above n 52, at 896.

claims. Even where there is precedent on key technical or legal issues – there are still lots of cases that need to reach an actual dollar amount in settlement. It is far more efficient to do this through mediation, taking case precedent into account, than bringing all cases through the courts. Even if full resolution is not achieved through mediation, it can help to narrow the issues, saving time in later arbitration or court processes. All of this helps to relieve pressure on the courts and promotes access to justice.

### Expertise

Through a scheme specifically for insurance mediation, mediators can be selected or trained so they have expertise in this area. Expert knowledge is helpful for these disputes, which can be highly technical and complex. This may be more efficient for resolving disputes than having a judge who is a generalist.<sup>191</sup> There is also the possibility of having a panel of experts available as part of the mediation scheme.

### Less adversarial process

Mediation brings parties together, providing the opportunity for catharsis. This is important in post-disaster disputes, where the issue may at least in part stem from the homeowner's frustration with the insurer. The opportunity for the homeowner to feel heard by the insurer and for the insurer to apologise may go a long way in resolving the dispute. Parties have the opportunity to discuss their position in an environment that encourages candour. These conditions often encourage settlement.

Further, parties are able to resolve a dispute together, on their own terms. Reaching agreement between them is empowering, and likely to result in greater satisfaction with the outcome, as well as more sustainable outcomes.

## Disadvantages

### Power imbalance

A key concern with mediating disputes between homeowners and insurance companies is the potential for power imbalance to arise and influence settlement. There is a potential advantage inherent for insurance companies, in that it is their job to know about the policy and negotiate a settlement in their best interests.<sup>192</sup> Representatives of insurance companies are also likely to have more knowledge of mediation, or have been to mediation.<sup>193</sup> A further power imbalance issue arises in the post-disaster mediation context, in that insurers, experts and mediators are often repeat players in such disputes.<sup>194</sup> Homeowners may be unsophisticated and unprepared for mediation.<sup>195</sup> They may also have experienced emotional trauma following the disaster – though it must be kept in mind the insurance company representatives are people too, and may also have been affected by the disaster.<sup>196</sup>

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<sup>191</sup> Pardun, above n 163.

<sup>192</sup> Harges, above n 52, at 904.

<sup>193</sup> Grant Morris and Freya McKechnie "Users of Commercial Mediation in New Zealand – Insurance Industry Report" (Research Paper, Victoria University of Wellington/Resolution Institute, 2017).

<sup>194</sup> For further discussion of this issue, see Carrie Menkel-Meadow, "Do the 'Haves' Come out Ahead in Alternative Judicial Systems?: Repeat Players in ADR" (1999) 15 Ohio State Journal on Dispute Resolution 19.

<sup>195</sup> Harges, above n 52, at 904.

<sup>196</sup> Harges, above n 52, at 910.

The psychological impact of the disaster may affect a homeowner's ability to negotiate a settlement; stress can impair decision-making facilities and affect memory.<sup>197</sup> Time pressure also causes decision-making accuracy to decline.<sup>198</sup> Time pressure also puts homeowners in a more vulnerable position – a homeowner may be living in substandard conditions while waiting for insurance money to repair their home. Insurers may be better resourced, and able to afford extensive legal and expert advice. A power imbalance may lead to the risk of coercion in parties coming to a settlement. However, the parties having legal representation can mitigate against the risk of a power imbalance.

#### Lack of safeguards

Compared with litigation, mediation lacks procedural safeguards. The settlement is not determined by a decision being made according to principles of law, but by the parties coming to an agreement. A homeowner should only agree to a settlement they think is fair, but in the face of impending litigation, they may just wish to settle.

It is important that homeowners are empowered in making a decision regarding settlement. They should have an understanding of what their options are, the mediation process, and what is fair and reasonable. Having legal advice and representation would ensure homeowners are informed on what their options are and how they should proceed.

The mediator, in their role as a third party neutral, should ensure there is no improper influence being exerted. However, they cannot go beyond this to advocate for the homeowner – as some US mediators reported doing.

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<sup>197</sup> Murrill above n 121, at 416.

<sup>198</sup> Murrill above n 121, at 416.

## 6 What should be done in New Zealand to prepare for disputes arising out of future natural disasters?

As discussed in this report, there is a need to plan a cohesive framework for dispute resolution following natural disasters. Ideally, New Zealand would have a framework provided for by legislation, ready to go in the event of a natural disaster. This section outlines what such a framework could look like.

A dispute resolution framework should be able to provide assistance for disputes at any stage. As such, providing advice and information to prevent a dispute from becoming intractable, providing ADR options, providing the option to escalate a dispute to litigation if necessary. Such a dispute resolution framework could be comprised of a central organisation or body, a mediation scheme, a tribunal and a specialist court list.

A government-implemented dispute resolution framework should be in line with the GCDR best practice principles. Therefore, any system needs to be user-focused and accessible, independent and fair, efficient, effective and accountable.

### Central organisation

Having an accessible central organisation would be helpful for people in the aftermath of a natural disaster. As discussed, natural disasters can be highly stressful and traumatic. In the aftermath, people will need assistance, information and access to legal advice.

A central organisation could have two main purposes:

1. Providing access to information and advice.
2. Engaging with people involved in disputes and helping them to prepare for dispute resolution processes.

This organisation could have similar features to the Earthquake Recovery Information Centre (ERIC) and the Residential Advisory Service (RAS). ERIC was established in Wellington following the 2016 Kaikōura/Wellington earthquake.<sup>199</sup> This acted as a “one-stop shop” for people to access experts from different agencies: Wellington City Council, Wellington Regional Economic Development Agency, the Ministry of Social Development, the Ministry of Business, Innovation and Employment, Inland Revenue and relevant community organisations. Having access to all of this in one place “helps businesses and individuals deal with post-quake issues quickly and more easily”.<sup>200</sup> After the Canterbury earthquakes, frustrations arose out of having to go to multiple agencies to access help.<sup>201</sup> ERIC provided advice and information on support packages, insurance, earthquake preparedness, business and employment support, and health and

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<sup>199</sup> Wellington City Council “Recovering from the quake? Eric’s here to help” (30 November 2016) <[www.wellington.govt.nz](http://www.wellington.govt.nz)>.

<sup>200</sup> Wellington City Council, above n 199.

<sup>201</sup> Wellington City Council, above n 199.

welfare.<sup>202</sup> RAS provides legal and technical advice to homeowners involved in disputes, as well as a brokering service – as discussed in section 4 of this report.

The Central Organisation could provide all or some of the following services:

- Access to information – through meetings with experts or through publications.
- Legal advice – through a Community Law provider.
- Technical advice – through a panel of specialists.

The Central Organisation could also be the access point for a mediation scheme or tribunal. Encouraging parties to a dispute to engage with the Central Organisation as soon as possible enables them access to information and advice to help with their dispute. If this is not enough, they may wish to access mediation. This proposed Central Organisation is user focused in that it provides people with a “one-stop shop” where they can obtain help with their disputes, and easily access a dispute resolution process. It also promotes accessibility and is in line with best practice principles.

## Dispute resolution scheme

As noted, a wave of insurance disputes commonly follows a natural disaster. The Canterbury earthquake experience indicated that New Zealand did not have adequate facilities in place to deal with these. Overseas experience demonstrates that having specific insurance dispute resolution options is helpful.

A specialist dispute resolution scheme would help to ensure that insurance/construction disputes were settled efficiently. This could be similar to those in the US, and to New Zealand’s Weathertight Homes resolution scheme. It could provide for mediation, or for mediation and a tribunal/adjudication process. It could include advocacy and other support services such as funded technical and legal advice. Having at least some costs funded ensures the service is accessible.

There are schemes in place that assist with resolution of insurance disputes, particularly the IFSO and Financial Services Complaints Limited, but these do not make full use of ADR techniques. A dispute resolution scheme specifically for natural disaster-related disputes, that provided access to mediation, would be more efficient and effective in resolving these disputes. Further, a scheme would provide access to justice for those who may not be able to afford litigation or private mediation. It would also be possible to build on these systems, or introduce mediation programmes within these systems, rather than creating an entirely new system.

There are parallels between weathertight homes disputes and post-natural disaster disputes. These disputes centre around issues with the condition of the claimant’s home. For many people, their home is their major asset, making these disputes of very high importance to

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<sup>202</sup> Wellington City Council, above n 199.

them. People involved in these disputes may not have previous experience with legal disputes and may be unfamiliar with dispute resolution processes. The claims often involve complex technical issues. The Weathertight Homes scheme has been successful in resolving disputes, with 80-85 percent of mediations currently resulting in settlement.<sup>203</sup> Though, it should be noted that this scheme has been operating for years and resolution rates were initially lower. The effectiveness of the Weathertight Homes scheme indicates a similar programme for insurance disputes would likely be successful, though perhaps not to the same degree. A natural disaster dispute resolution scheme could be based on the Weathertight Homes scheme or set up using some of its infrastructure.

The criteria for whether a dispute is “disaster-related” and qualifies for such a scheme could be similar to that of a specialist disaster-related dispute Court List. This would provide continuity and allow disaster-related cases to proceed from mediation to litigation quickly if needed. This also emphasises that any ADR scheme (mediation/tribunal) is complementary to the court system. Disputants have the option of going to court. A mediation scheme does not interfere with this, rather offering disputants the opportunity to settle should they want. Even if mediation does not achieve full resolution, it can help to narrow the issues that are still in dispute for the subsequent arbitration process.

## Mediation programme

As discussed, mediation programmes are effective in resolving disputes efficiently. Having a dispute resolution scheme in place that provides the option to mediate is in line with best practice principles, as mediation is time-efficient, flexible (and therefore accessible and user-focused).

## Establishing a programme

As noted, mediation schemes are most effective when planned in advance and ready to go shortly after a natural disaster. Legislation should provide for this, preferably giving some detail as to what the scheme would involve. The legislation should also provide some flexibility so that a scheme could be tailored to the circumstances of the disaster at hand and adapt to changes over time.

The objectives and jurisdiction of the scheme, particularly the types of disputes that it will address and any thresholds (e.g. the value of those disputes) should be clearly identified and defined. The legislation should set out what kind of event “triggers” the scheme: a natural disaster, of a certain scale, or causing a certain amount of damage or insurance claims. There should be criteria for participation, e.g. that a scheme is for residential claims only. Criteria for eligibility should be based on making the scheme as effective as possible.<sup>204</sup> Admittance to the mediation programme could also be based on whether parties have made a genuine effort to resolve the dispute, as is required for employment mediation.

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<sup>203</sup> Government Centre for Dispute Resolution *Case studies: Weathertight Homes* (13 January 2016).

<sup>204</sup> United Policyholders *Best Practices for Post-Disaster Insurance Claim Mediation Programs* (26 February 2013) at 12.

### *Administering a programme*

A mediation scheme could be run by the government, or by an independent body. The government has experience in running mediation schemes, e.g. for weathertight homes and for employment disputes. The government, particularly MBIE, employs mediators already and therefore has access to a pool of them. An alternative could be the government employing an independent body to administer the scheme, e.g. Resolution Institute or the Arbitrators' and Mediators' Institute of New Zealand (AMINZ). This is in line with the United States mediation programmes, commonly run by the American Arbitration Association. Another benefit of having one of these professional bodies administer a programme is their access to mediators, through their members. Having a scheme run by the government or an independent provider would promote independence and fairness, consistent with best practice.

### **Funding**

Funding of the scheme could either come wholly from the government or from the insurance industry, be split between them, or be user-pays. Providing funding would make the scheme as affordable as possible for claimants, and therefore as accessible as possible. An industry-funded or split funding model would be less independent than a scheme provided by the government. Insurers may be hesitant to pay this extra cost, and it should be noted that this could have an effect on insurance premiums. Though, such a scheme could lessen the impact of disputes on insurers' internal dispute resolution processes, and lessen the need for insurers to litigate or organise private mediations. A user fee can present a barrier to access, but also deters frivolous or vexatious claims.

### **Insurer obligations**

A mediation scheme should place obligations on insurers to ensure fairness for users. Mediation programmes in other jurisdictions are often optional for the insured and compulsory for the insurer.<sup>205</sup> New Zealand industry schemes go one step further and commonly make determinations binding on the industry party, but not on the consumer. Some overseas mediation schemes require the insurer to notify the insured of their right to go to mediation – within notice period of 5-10 days of the insurer becoming aware of the dispute.<sup>206</sup> The scheme should include these features so that it is fair, user-focused and accessible.

The programme should also have a cooling off period: three days has been standard, though a week could be more beneficial.<sup>207</sup> This is user-focused: protecting the interests of the insured by ensuring they have time to reflect on the settlement. It also goes some way to addressing inherent power imbalances between the parties. This acts as a further procedural fairness safeguard; ensuring that potentially vulnerable homeowners are satisfied with their settlement and did not feel pressured into agreeing to it. Ensuring a scheme is “designed to foster competent decision making” is important for mitigating any potential power imbalance.<sup>208</sup>

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<sup>205</sup> United Policyholders, above n 204, at 20.

<sup>206</sup> At 20.

<sup>207</sup> At 17.

<sup>208</sup> Murrill, above n 121, at 403.

## Mediators

Mediators involved in an insurance mediation scheme should be qualified, and preferably have prior experience and/or training related to insurance claims.<sup>209</sup> The organisation administering the scheme could train mediators in the specifics of mediating post-disaster disputes. Disputes following a natural disaster are different from disputes in ordinary circumstances, as levels of stress and emotions are heightened. Mediators could benefit from receiving training on dealing with parties who may be traumatised, or very highly stressed. Training on technical issues would also be beneficial, such as improving mediators' understanding of geotechnical classifications, foundation types and quantity surveyors reports. The scheme will be more effective if staff have the necessary skills, qualifications and experience to perform their roles and access to appropriate training and support.

Overseas sources provide differing views on whether it is beneficially to source mediators locally, i.e. from the area where the disaster occurred. On one hand, local mediators will better understand what parties have gone through, having themselves experienced it. On the other, there is the argument that mediators living and working in a disaster area who are experiencing their own issues may find it difficult or may not be seen to be objective. However, mediators are trained to be neutral and objective. This should not raise significant issues.

Mediators act as a neutral third party. They should strive to protect against a power imbalance, but should not go as far to protect or advocate for the homeowner – as there is some indication of in US schemes. The mediator should encourage the parties to avoid positional bargaining, and should “guide negotiations toward a resolution of mutual gain”.<sup>210</sup> The mediators could be given flexibility to choose the approach they use or could be prescribed a facilitative mediation process.

## Role of parties

Parties should be adequately prepared for mediation. It may be necessary to provide homeowners with education on the mediation process, including readily accessible information that is easy to find and understand. Parties to a dispute should have a clear understanding of what their obligations are: they may need to prepare documentation or proof of claims, or meet with advisors during the pre-mediation process.<sup>211</sup> The insurance company representatives should have authority to settle for the full amount disputed in the claim. Parties should have legal representation, to prevent the possibility of any power imbalance affecting the settlement. However, not being able to afford legal representation should not be a barrier to participation in the scheme. There may be a need for legal aid to be provided if possible. Other support services, including advocacy to help claimants navigate the process, should also be considered.

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<sup>209</sup> See United Policyholders, above n 204.

<sup>210</sup> Newcastle Renewal Coordination Unit, above n 50, at 14.

<sup>211</sup> United Policyholders, above n 204, at 14.

## Role of experts

Expert opinions will be important for many insurance/construction disputes. It would be helpful to have a pool of experts available, otherwise there are still major costs for homeowners. Expert advice could alternatively be provided through the proposed Central Organisation. There is also the option of having a panel of neutral experts to provide opinions for both sides of the dispute, rather than having experts on each side. This could prevent disputes becoming a “battle of the experts”. However, this raises a risk that the experts’ opinion may essentially become the decider of the dispute. With the Weathertight Homes dispute resolution process, the government funds an independent technical assessment report. This could be the best option for a mediation programme as it is user-focused (ensuring disputants get an expert assessment), effective and effective (avoiding the battle of experts) as well as independent.

## Confidentiality

Confidentiality is a key tenet of mediation and is important in encouraging candour from the parties. Mediations under this scheme should be confidential – though there should be appropriate data collection and reporting on the outcomes (see below). A tribunal may also need to be informed of the outcomes, as with the Weathertight Homes scheme.

## Data collection

Consistently collecting and recording data will be crucial for assessing whether post-natural disaster dispute resolution schemes are working effectively, but can be used to do much more. Data collection may be as simple as recording settlement rate and parties’ satisfaction with the process. Best practice data collection would go further, such as recording the outcome and any settlement amount reached, the time taken to mediate a dispute, the issues that were in dispute, and any escalations (e.g. appeals to court).

Any concerns about privacy or confidentiality can be managed by anonymising the data. Robust and consistent data collection will indicate whether a scheme is running successfully. This provides accountability, and the opportunity for improvements to be made to the scheme where necessary to ensure it remains fit for purpose. It provides important information on the volume and types of disputes that are arising. This will in turn provide valuable intelligence on pain points and emerging systemic issues (e.g. possible problems with legislative provisions).

## Tribunal

A tribunal for earthquake-related disputes could be modelled on the Weathertight Homes Tribunal process. The major benefit of having a tribunal is that it gives parties a decision on their dispute, without having to go to court. This is helpful in light of issues with power imbalance potentially influencing a settlement. If the homeowner feels the settlement reached is not fair, they have the option to go to a tribunal, even if they cannot afford to litigate. The tribunal should also be able to offer slightly quicker and cheaper resolution and more flexible and responsive processes than a court. It should be noted that a tribunal should not be able to override the terms of an insurance contract in giving a decision on a dispute.

Tribunals are, however, costly to establish and administer. There need to be clear and compelling arguments for a tribunal and significant advantages over existing mechanisms, or alternative approaches. A tribunal that can be repurposed for each new disaster event is more likely to satisfy a cost-benefit analysis. It could be beneficial to explore the possibility of expanding the Weathertight Homes system to provide for homes damaged by natural disasters, or planning a tribunal based on that of the Weathertight Homes system to be set up in the event of a disaster.

Some overseas programmes only provide for mediation, without a tribunal type option. If possible, both mediation and a tribunal should be provided. This gives disputants the option to 'escalate' their dispute if mediation did not settle it, without having to go to court. However, it would be beneficial to analyse whether it would be worth having a tribunal if a specialist court list was in place to ensure natural-disaster related cases were heard promptly. Presumably, going to a tribunal would still be quicker, as tribunals have less strict procedural requirements. Having the option for mediation, a tribunal and litigation is arguably more in line with the best practice principles. Providing the extra option is more user-focused and accessible in that it gives people an extra option, and a cheaper and more flexible one at that. It is likely that many disputes could be resolved at the tribunal stage. This is the case with the Weathertight Homes Tribunal. Also, gathering evidence for a tribunal hearing could make it quicker to prepare for trial if the dispute ended up in court. However there is some risk that insurers, generally having the resources for litigation, may simply be going through the process waiting for their day in court. A tribunal would be beneficial so long as insurers engaged with the process fully.

## Court List

The Christchurch High Court's Earthquake List was successful in both encouraging private settlement and resolving cases more efficiently.<sup>212</sup> Such a List should be reinstated in the event of a future natural disaster causing a large number of insurance disputes. A future List could be made more effective than the Earthquake List by being set up promptly following a disaster. As discussed, the List helped to make court processes more efficient. This is beneficial in terms of access to justice for these cases, and also so there is case precedent for the issues arising. Precedent is crucial for mediation, providing parties with an indication of what is fair and reasonable, and allowing mediation to take place in the shadow of the law.

It could also be beneficial to have plans providing for what could be done logistically if court buildings were damaged. As noted, some US courts have such plans in place. Lack of court facilities caused delays following the Canterbury earthquakes, raising issues with access to justice.

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<sup>212</sup> See Khouri, above n 22, and Kós J, above n 75.

## 7 Conclusion

New Zealand is a country prone to natural disasters, but still underprepared to deal with their consequences. The Canterbury earthquake experience demonstrated that measures in place to deal with insurance disputes were not adequate. Following the Canterbury earthquakes, the government treated insurance disputes as a private law issue, as insurance policies are a private contract between the insurer and the insured. The government must always be careful to avoid interfering with the sanctity of freedom of contract as this could create uncertainty for commercial dealings. However, these disputes – and the time taken to resolve them – have major public implications. Where people have trouble recovering payment to repair their houses, they may be forced to remain living in substandard conditions. Homeowners may cash settle for amounts that do not fully recover repairs/rebuilds and have to move. Issues arose with housing stock following the Canterbury earthquakes. This is a social issue, and the government could have done more to intervene in this area, by promoting the efficient and effective resolution of insurance disputes.

Overseas jurisdictions' responses to natural disasters and ensuing disputes indicate that specialised insurance mediation schemes are effective. The establishment of an equivalent mediation scheme in New Zealand could be similarly successful. Mediation has not been used to its full potential in New Zealand and there is substantial scope for its increased use. This could be done in combination with other dispute resolution options, as discussed in the previous section.

A suggested approach would be a scheme involving: a central organisation to oversee the dispute resolution scheme, a mediation programme, a tribunal and a specialist court list. This would be particularly user-focused, accessible and effective. A central body overseeing the scheme should ensure it is well coordinated and therefore efficient in allowing disputes to progress. Data collection (potentially done by the central body) would ensure the scheme is accountable, allowing for ongoing improvement and better outcomes. Having the option to escalate disputes if necessary promotes fairness and justice. This is the most comprehensive option and consequently the most expensive. It could be possible to establish a similar system still consistent with best practice principles on a more cost-effective basis by utilising and improving existing options, as noted.

A framework that promotes efficient and fair resolution of disputes should be planned for, in case of another major natural disaster. This would assist people with resolving any disputes arising and help them to recover from the disaster.

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