

Chair  
Ad Hoc Cabinet Committee on Canterbury Earthquake Recovery

## **Paper 2: Canterbury Earthquake Recovery: Proposed Powers**

### **Purpose**

- 1 This paper recommends that certain powers are vested in the Minister for Canterbury Earthquake Recovery and the Canterbury Earthquake Recovery Authority (CERA) in order to enable an effective, timely and coordinated recovery effort of Christchurch and the greater region (greater Christchurch)<sup>1</sup> following the earthquakes of 4 September 2010 and 22 February 2011.
- 2 This paper should be read as a companion to *Paper 1: Canterbury Earthquake Recovery: Proposed Governance Arrangements*. That paper proposes the establishment of CERA as a government department.

### **Executive summary**

- 3 Effective earthquake recovery will require timely decisions that would not be possible under current legislation. This paper describes the activities that the Canterbury Earthquake Recovery Authority (CERA) will undertake and consequently the powers that the Minister for Canterbury Earthquake Recovery and/or CERA will need to undertake to ensure a timely and co-ordinated recovery effort.
- 4 One of CERA's major tasks will be to develop the Long Term Recovery Strategy (the Recovery Strategy), and develop, or ensure development of, a series of Recovery Plans that will guide the recovery process. This paper describes the status of the Recovery Strategy and Recovery Plans and the powers necessary to implement them. The paper also outlines how compensation and appeals will be handled within the recovery processes.
- 5 A considerable array of powers is proposed for the Minister for Canterbury Earthquake Recovery and/or CERA, either directly or through the status attached to the Recovery Strategy and Recovery Plans. Some of these powers will be applied directly, such as the Minister's ability to approve Recovery Plans and for these Plans to override other statutory plans. Other powers, such as those relating to other parties' role in implementing Recovery Plans, will be held in reserve and used only if necessary for ensuring an effective, timely and coordinated recovery.

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<sup>1</sup> Greater Christchurch covers the areas of the three territorial authorities (Christchurch City Council, Selwyn District Council and Waimakariri District Council) and one regional council (Environment Canterbury).

## Background

6 On 16 March 2011, the Ad hoc Cabinet Committee on Canterbury Earthquake Recovery noted that further work is required to develop the governance proposals, in particular in relation to:

- The proposed recovery planning provisions;
- The proposed powers to be conferred on the Minister for Canterbury Earthquake Recovery, including further advice on the rationale for each of the powers and whether alternative mechanisms could be used;
- The proposed compensation and appeal provisions, including further advice on how existing rights would be affected;
- The options for providing independent advice and scrutiny of the proposed powers and Orders;
- The legislative vehicle for the proposals.

[ACE Min (11) 6/1]

7 Further relevant background information is outlined in the companion paper *Paper 1: Canterbury Earthquake Recovery: Proposed Governance Arrangements*.

## The need for legislation

8 The Canterbury Earthquake Response and Recovery Act 2010 expires on 1 April 2012 and so do any Orders in Council that have been made under it. The recovery effort is likely to go on for some time past this expiry date. There is therefore a need to work through what options are available to government to ensure that Minister for Canterbury Earthquake Recovery and CERA can ensure a timely and coordinated recovery effort of Christchurch and the greater Christchurch region.

9 We considered three options:

- *Option one*: no additional legislation; or
- *Option two*: amendment to the existing Canterbury Earthquake Response and Recovery Act 2010; or
- *Option three*: new primary legislation.

### *Option one: No legislation*

10 If there were no additional legislation, the Orders in Council process under the Canterbury Earthquake Response and Recovery Act 2010 could be used to modify legislation to give the Minister and CERA powers to coordinate and effect the recovery. However, any planning undertaken by CERA would not have any statutory basis and could not override existing statutory plans. The Canterbury Earthquake Response and Recovery Act, and any Orders in Council made under it, would cease to have effect from 1 April 2012 and this could not be amended without legislation. The more intrusive powers that are considered necessary for an effective recovery would be subject to greater risk of legal challenge by judicial review if they were provided through the Orders in Council process. For these reasons we did not consider this option to be viable.

*Option two: Amending the Canterbury Earthquake Response and Recovery Act 2010*

- 11 The Canterbury Earthquake Response and Recovery Act 2010 could be amended by:
- extending the time period of that Act, including the Orders in Council made under that Act (out a further 5 years, with a review at 4 years),
  - clarifying that the Act covers the 22 February aftershock,
  - providing for specific powers for CERA,
  - providing for any plans prepared by CERA to have statutory authority over other plans,
  - disbanding the Canterbury Earthquake Recovery Commission and establishing a Review Panel (as outlined in the companion paper).
- 12 The advantage of amending the current Canterbury Earthquake Response and Recovery Act is that it would be apparent that mechanisms that people have become accustomed to, such as the Orders in Council process, would continue. The disadvantage is that there would be a significant amount of new material included in the Act, to the point where it resembles new legislation rather than an amended Act.

*Option three: New legislation*

- 13 This option would:
- repeal of the Canterbury Earthquake Response and Recovery Act 2010;
  - save and validate those things done under the repealed Act;
  - continue in effect Orders in Council made under that Act and extend the expiry date of those Orders in Council where appropriate; and
  - confer on the Minister for Canterbury Earthquake Recovery and/or CERA a series of powers in order to effect the timely and co-ordinated recovery of greater Christchurch.
- 14 The powers conferred under the new legislation would need to be exercised in accordance with its purpose. The new legislation would have a sunset provision for the legislation of 5 years (with a review at 4 years).
- 15 The advantage of new legislation is that it is the most cost-effective and appropriate means of implementing new policy and resolving a particular problem or problems. For example, existing legislation does not provide for a coercive power to prohibit or require actions to be taken or not taken for the recovery efforts. New legislation, recognising the unique set of events, powers and authorities required is a proportionate response to:
- the need for timely and effective decision making powers which recognise the magnitude of the event and the scale of the post-earthquake rebuilding (social, economic, natural and built environments) effort;
  - lessons learnt from international experience and from the recovery planning after the 4 September earthquake including the strong indication to have a single entity in charge of and responsible for the recovery efforts; and

- the significant co-ordination needed between local and central government, residents of greater Christchurch, Ngai Tahu, NGOs, business interests and the private sector.

### *Proposed legislative solution*

- 16 Taking into account the above factors, our preference therefore is to introduce new legislation and therefore repeal the Canterbury Earthquake Response and Recovery Act (which will also disestablish the Canterbury Earthquake Recovery Commission).

### **Powers and activities**

- 17 The powers proposed for the ongoing recovery effort are based on the activities that we anticipate will need to be undertaken. In considering the powers that are needed the following factors have been taken into account:

- *Powers to be exercised for specific purposes:* All of the powers to be created by the proposed legislation will be required to be exercised for the specific purposes of the legislation, where the Minister or CERA reasonably consider them necessary. You could also insert an additional requirement that the powers are exercised proportionately, in the decision-maker's opinion, with the nature of the problem being addressed. **[Withheld under section 9(2)(h) of the Official Information Act 1982.]**

.The purposes of the legislation should reflect the following:

- the provision of appropriate measures to ensure greater Christchurch and its communities respond to and recover from the impacts of the earthquake of 4 September 2010, the aftershock of 22 February 2011 and other aftershocks, and any subsequent events (the events);
  - the Minister and CERA to be provided with adequate statutory functions and powers to assist with the recovery from the impacts of the events;
  - there is the ability, by Order in Council, to relax or suspend, grant an exemption from, or modify, or extend any provision of any enactment to facilitate the planning, rebuilding and recovery of affected communities including the repair and rebuilding of infrastructure and other property to enable a focused, timely and expedited recovery from the effects of the events;
  - enable the gathering of information about any structure or any infrastructure affected by the events that is relevant to how to minimise the damage caused by the events or is necessary for developing the Recovery Strategy or a Recovery Plan;
  - restoration of social and economic well-being of greater Christchurch communities following the events;
- *Powers introduced to the extent necessary:* The current roles and responsibilities of all parties are regarded as the default position. Powers are introduced to the extent necessary to enhance normal powers, or to temporarily override others' powers, as opposed to establishing a completely new regime as the default position;
  - *Legislation Advisory Committee Guidelines utilised:* Proposed powers have been tested against a series of questions; as set out in the Legislation Advisory Committee guidelines, such as whether suitable powers are available under

existing law, who should hold the power, is the process for establishing the power established, and what protections are needed for those affected by exercise of the power. This analysis is set out in the Table in Annex 1;

- *Trade-offs between speed and participation in decision making required:* In determining the powers that are likely to be needed, consideration has been given to the potential trade-off between speed of decision making and public participation in that decision making. This can not be anticipated exactly, and will require judgement at appropriate times when particular powers are exercised;
- *Orders in Council process to remain:* To be transparent about the powers that the Minister and/or CERA will need, these should be specified in legislation as much as possible. However, at this point it is not possible to anticipate every power that CERA will require. Consequently the ability to implement Orders in Council, as was provided for in the Canterbury Earthquake Response and Recovery Act 2010 is maintained. It is also proposed to add powers enabling CERA to “call in” activities or decision-making powers of local authorities and council organisations so that it is able to ensure implementation happens in a timely and coordinated way; and
- *Geographical application:* It is proposed that there needs to be a timely and coordinated ongoing recovery effort of Christchurch and the greater region (greater Christchurch). Greater Christchurch covers the areas of the three territorial authorities (Christchurch City Council, Selwyn District Council, and Waimakariri District Council).

18 The activities and powers are set out in Annex 1 – *Powers for the Minister for Canterbury Earthquake Recovery (and the Canterbury Earthquake Recovery Authority by delegation)*. In summary, the list in Annex 1 is based on the following broad categories of activities:

- The Minister (with assistance from CERA) carrying on activities and responsibilities to coordinate the recovery, following the ending of the State of National Emergency. These are similar to activities and responsibilities currently exercised by the National Controller, and would be exercised in accordance with the purposes of the new legislation;
- CERA developing the Long-Term Recovery Strategy (“Recovery Strategy”) in collaboration with other stakeholders, including local government, other central government departments and agencies, Ngai Tahu and regional business and community groups; and
- The Minister and CERA ensuring implementation of the Recovery Strategy and Recovery Plans occurs efficiently either through its own action or through monitoring the actions of others who have a responsibility for implementation.

19 Some of these activities will require the immediate use of certain powers in order to maintain the momentum from the response period to the recovery phase. Some powers will be held in reserve and only utilised where necessary.

20 CERA will have a range of functional roles associated with its planning and monitoring activities. These include leader, planner, doer, coordinator, communicator, monitor, influencer and, if necessary, director. In certain situations, CERA will require a legislative power to enable it to undertake a particular function.

- 21 The sequence of CERA's activities will need to reflect its ability to be agile responding to immediate issues in a timely fashion while simultaneously undertaking planning and implementation work. This will mean some decisions will be taken and implemented before planning is completed. Any planning undertaken will need to reflect this. CERA's activities will be guided by the phases of the recovery cycle.
- 22 Just as the Minister's and CERA's activities will be guided by the phases of the recovery cycle, so too will the exercise of their powers. Where the Minister or CERA has used a power to take over responsibility for activities normally undertaken by a local authority or council organisation, this power will be relinquished once the Minister is satisfied the need for it has passed and responsibility will revert to the relevant local authority or council organisation.
- 23 A large proportion of the powers described in Annex 1 are focused on the rebuild of physical infrastructure, because it is in these areas where the legislative frameworks need to be amended. However, the Recovery Strategy and implementation activities will also focus on the economic and social recovery.
- 24 A considerable array of powers is proposed for the Minister for Canterbury Earthquake Recovery and/or CERA, either directly or through the status attached to the Recovery Strategy and Recovery Plans. Some of these powers will be applied directly, such as the Minister's ability to approve Recovery Plans and for these Plans to override other statutory plans. Other powers, such as those relating to other parties' role in implementing Recovery Plans, will be held in reserve and used only if necessary for ensuring an effective, timely and coordinated recovery.
- 25 We note that the Minister for Canterbury Earthquake Recovery, as a Minister of the Crown, has requiring authority status under the Resource Management Act and that powers to designate land are automatic for persons or entities with requiring authority status.
- 26 CERA itself, and the powers vested in CERA, will only exist for the duration of the earthquake recovery. It is proposed the legislation will have a sunset clause at 5 years, reviewable after 4 years.
- 27 In addition it will be important for all parties to participate in the recovery as appropriate in order to effect a timely and co-ordinated recovery effort.

## **Planning for the recovery of Christchurch**

### ***Overview of planning process***

- 28 Planning for the recovery of the greater Christchurch region will occur through the development of a strategy setting the overall direction for the recovery efforts and a series of more detailed plans that will set out the detail of what needs to be done and how it will be implemented (the Recovery Strategy and Recovery Plans). We propose there will be special legislative powers to enable the planning and implementation processes to be streamlined. This section outlines the processes for developing and approving these planning documents, their status within the legislation, and how they will fit with existing statutory planning documents.
- 29 Before the plans have been developed, there will still be a need for the Minister and/or CERA to take decisions and to exercise powers. An example of a decision

that will need to be made prior to the Recovery Strategy being put in place relates to land condition future use (including whether some land is unsuitable for residential purposes). Such decisions will be based on geotechnical and scientific-based investigations and conclusions. Where specific authorisations are required, these are identified in Annex 1.

- 30 The recovery planning will not take place in a vacuum. Although substantial damage has been done to Christchurch and some of the areas nearby, much of the city and neighbouring areas remain more or less intact or repairable. Existing planning documents such as the Greater Christchurch Urban Development Strategy, Environment Canterbury Regional Policy Statement, and Christchurch City Plan provide a useful basis from which to manage development, particularly in areas of the city with little or no damage. However, decisions over the demolition of damaged buildings and the use of land and rebuilding in damaged areas of the city will require direction and coordination to help ensure recovery efforts are timely, efficient and cohesive.

### ***The Recovery Strategy***

- 31 The legislation will require the CERA to prepare an overarching Long-Term Recovery Strategy (the Recovery Strategy) for the reconstruction and rebuilding of greater Christchurch. The Recovery Strategy will provide a purpose for the recovery and address some of the high level questions that will need to be addressed for the recovery to occur in a coordinated way. The Recovery Strategy will provide direction and coordination for Recovery Plans. The Recovery Strategy will be prepared in collaboration with Christchurch City Council, and where appropriate with Environment Canterbury, Selwyn District Council, and Waimakariri District Council, Ngai Tahu and other parties deemed necessary.
- 32 We propose to require a draft of the Recovery Strategy to be prepared for consultation within three months of enactment of the legislation. Consultation will include a process that incorporates an opportunity for public input through written submissions and a series of hearings. The power to approve the final Recovery Strategy will rest with the Minister for Canterbury Earthquake Recovery following consideration by Cabinet.
- 33 We propose that the legislation require the relevant parts of the Recovery Strategy (where it creates roles for councils) to be immediately incorporated, or given effect, to the extent necessary into the Long Term Plans of councils in the Greater Christchurch area. The Recovery Strategy should also form part of the triennial agreements under the Local Government Act. To the extent that the Recovery Strategy has a bearing on resource management issues in the region it should be incorporated, or given effect, into the regional policy statement for the Canterbury region, the relevant regional plans and district plans, and other statutory plans, as soon as practicable.

### ***Recovery Plans***

- 34 The Minister for Canterbury Earthquake Recovery will be given the power to require, as necessary, the preparation of Recovery Plans by CERA, relevant government agencies, councils, or other bodies, authorities (including requiring authorities and network utility operators), or entities. Whereas the Recovery Strategy provides the

overarching direction, the Recovery Plans have the purpose of setting out the detail of what needs to be done, where, how, when and by whom.

- 35 Recovery Plans may cover any social, economic, cultural, infrastructural or environmental matter, for example such as waste and stormwater, public transport, economic recovery, communications, or heritage buildings, or combination thereof. Recovery Plans may be area-specific (for example limited in extent to Halswell or Avonside or to the area covered by the Waimakariri District Council), or apply to the entire Greater Christchurch area (such as when tied to rebuilding network infrastructure). For example, we can foresee that there will be decisions around prioritising repairs and rebuilds of schools along with potential decisions about the network of schooling across Christchurch. These decisions would need to be coordinated with decisions around transport networks, housing and health facilities.
- 36 The legislation will require that a Recovery Plan be produced for the Christchurch commercial business district (CBD) within nine months of enactment. Christchurch City Council will lead development of the CBD Recovery Plan (including community engagement) with input from CERA and Ngai Tahu and other parties deemed necessary. The CBD Recovery Plan preparation process will incorporate a public process that allows for input by way of submissions and a streamlined hearing process.
- 37 The necessity for other Recovery Plans will be determined by the Minister for Canterbury Earthquake Recovery and set out in a schedule notified in the Gazette for the purpose of public notification. The Minister may modify this schedule since changing needs or circumstances may require further Recovery Plans to be created, or proposed Plans amended or abandoned if they are no longer required. Any change to the schedule must be notified in the Gazette.
- 38 Recovery Plans must give effect to the Recovery Strategy. Each Recovery Plan will set out the priorities, approach and any necessary provisions to expedite recovery works, processes, provision of services, or programs for the matter or area to which it relates. It is proposed that there be a statutory requirement that Recovery Plans be not inconsistent with other, existing Recovery Plans. Funding implications and sources of funding will, where relevant, be included in each Recovery Plan.
- 39 A Recovery Plan may be prepared in advance of the Recovery Strategy being completed (as in the case of restoring essential utilities such as water, where the plan prepared by the National Controller could be approved by the Minister as a Recovery Plan when the state of national emergency is lifted). However, where this occurs, in order to ensure the Recovery Plan gives effect to the Recovery Strategy, the Recovery Plan should be reviewed once the Recovery Strategy is approved.
- 40 The Minister for Canterbury Earthquake Recovery (or the Chief Executive of CERA acting under delegation) will have the discretion to determine the process to be followed in regard to the preparation of each Recovery Plan and the extent of engagement or consultation with councils and other stakeholders, having regard to the:
- nature and scope of the Recovery Plan;
  - needs of people affected by it;
  - funding implications and sources of funding;



- need to act expeditiously;
- need to ensure that the Recovery Plan is not inconsistent with other existing Recovery Plans; and
- impact and effect of the Recovery Plan.

41 Recovery Plans must be approved by the Minister for Canterbury Earthquake Recovery. The Minister's approval will give each Recovery Plan legal authority. The legislation will provide the Minister with a discretion to seek an independent review of the draft Recovery Plan before it is approved, but there will be no right of appeal in respect of decisions to approve Recovery Plans by the Minister.

42 It is desirable for the legislation to allow all, or parts, of a Recovery Plan to have immediate legal effect from the date the Plan is approved or a date specified in the Plan, with respect to plans and planning processes under the Resource Management Act 1991 (RMA), the Local Government Act 2002, the Land Transport Management Act 2003, and the Reserves Act 1977. To this effect, it is proposed that the Recovery Plans will be "read into" the statutory plans and prevail to the extent they are inconsistent with those statutory plans. This means Recovery Plans can immediately begin to influence decisions made on RMA resource consents or notices of requirements before relevant provisions of the Recovery Plans are included in RMA policy statements and plans. For example, a resource consent will be able to be granted by the consent authority if the resource consent is consistent with the relevant Recovery Plan (or Plans), even if the resource consent application is inconsistent with an existing RMA plan(s). Likewise, where a resource consent application or activity is consistent with an RMA plan but inconsistent with a Recovery Plan the resource consent application must be declined by the council.

43 As well as the ability to read the Recovery Plans into other planning regimes as described above, it will be necessary to write the Plans into these other planning regimes so that the direction and specific provisions of the Plans continue after the expiry of the new legislation.

44 We consider there should be an expedited process for this writing in process. At present we are not able to identify the details of this process or specific legislative changes to enable a robust and expedited process. We therefore propose that the Orders in Council process is used to streamline this process as the need evolves.

### ***Other planning provisions***

45 CERA will monitor the implementation of Recovery Strategy and Recovery Plans in conjunction with the councils of greater Christchurch area and any other authority required to produce a Recovery Plan. Councils will be responsible for the monitoring of provisions that are deemed or directly incorporated into their plans (be they prepared under the RMA, Local Government Act, or other legislation that requires or enables the preparation of such plans).

46 It is proposed that where any local authority or council organisation is not exercising or performing any of its functions, duties or powers under a Recovery Plan, the Minister for Canterbury Earthquake Recovery may step in and take over those functions, or appoint a person, persons or other entity to perform all or some of those functions, duties or powers.

## Other provisions

- 47 In addition to the legislation conferring the necessary powers, other provisions will be needed to provide for:
- a penalty or enforcement section that requires compliance with the directions given under the powers and that would make it an offence to refuse to follow a lawful direction (empowered by legislation to be given), and enable CERA to obtain an ex-parte enforcement order from the High Court;
  - an immunity from liability clause for employees acting in good faith when exercising or carrying out the powers;
  - a requirement to consider alternatives and assess benefits and costs when approving a Recovery Plan;
  - prior to the approval of the Recovery Strategy, the Minister to lay before the House, at no less than quarterly intervals, a report on the operation of the statutory powers and include in the report a description of what powers have been exercised.

## Extent of the powers

- 48 CERA will not be able to rate nor direct local authorities to rate. Local government will continue to hold rating powers and be expected to strike rates in accordance with normal statutory processes.
- 49 CERA will not assume any role, functions, or powers specifically provided for within the Civil Defence Emergency Management Act. If another emergency occurs in greater Christchurch, the Civil Defence Emergency Management framework will prevail for the *response* period. The *response* roles and functions of agencies such as the New Zealand Police, New Zealand Fire Service, the New Zealand Defence Force will not be altered. Any recovery from a new emergency event would fall within the new framework proposed in this paper for the period this framework is in place.

## Compensation and appeals

- 50 The powers described previously in this paper mean the Minister and CERA will be making decisions that impact on personal property and property rights. In exercising these powers, consideration needs to be given to compensation and appeal rights, each of which introduce financial and timing dimensions.
- 51 Compensation and appeals are related rather than being distinct as each provide some measure of protection against the exercise of powers. Where appeal rights are truncated the fairness of compensation can become more important.

## Compensation for takings of land

- 52 CERA will need the power to acquire land or an interest in land (including fixtures such as buildings), compulsorily if necessary and to demolish buildings, rebuild or change the use of an area. For example, in order to facilitate the recovery of Christchurch it may be necessary for CERA to demolish a building (that is otherwise

sound), or rebuild on a site, or otherwise take control of land and use it in a new way (such as to form part of a new commercial centre, or a park, or for remediation). Legislation will need to broaden the purposes for which land can be taken by CERA, because some projects may not come within the existing scope of the meaning of a public work under the Public Works Act 1981 (PWA). This is discussed in Annex 2.

- 53 In the absence of any statutory provisions the common law will generally imply a right to compensation where an interest in land (which includes fixtures such as buildings) is compulsorily acquired for any public purpose. Any legislation that provides for acquisition will, therefore, need to explicitly address questions of compensation.
- 54 The orthodox position is that any compulsory taking of land under the PWA must be fully compensated:
- including compensation for legal, valuation costs, transport of chattels, immovable improvements, and consequential to refinancing costs;
  - on the basis of willing seller to willing buyer in an open market;
  - with the value assessed as at the date of taking;
  - with the owner having rights of appeal over the decision to acquire, and the quantum of compensation;
  - with the former owner having a right to require the land be offered back when it is no longer required for a public work.
- 55 The magnitude and urgency of the task of rebuilding and revitalising greater Christchurch, however, means that any compensation framework needs to be carefully considered to ensure that it is fair, but also minimises uncertainty and delay.
- 56 To avoid delaying the actions required to revitalise greater Christchurch, the legislation will need to provide that compensation arguments need not be resolved until after the land is taken and used by CERA and that there should be no appeal of the decision to acquire. CERA will also need to be able to nominate in whose name the interest in land is being acquired because CERA itself is not an enduring entity or long term asset owner. This means it may acquire in the name of the relevant local authority (eg, for a reserve or public space) or through a special purpose vehicle which may be part owned by another party such as a council.
- 57 There are a range of possible options on a spectrum from limited or no compensation to full compensation to enhanced compensation.

*Option one: No compensation*

- 58 It would be possible through legislation to empower CERA to acquire land without specifically providing for compensation provided the legislation made it clear that no compensation is to be provided despite any taking of property rights. Taking buildings that cannot be used and meeting the costs of their disposal may be seen as creating a benefit and not something the Crown should pay compensation for. This could be provided for. However, taking land without compensation, even if it can no longer be used for supporting buildings, is less likely to have support and

would be highly unusual. The Courts are likely to attempt to read down any such legislation unless it is clear.

*Option two: Market compensation*

- 59 Full compensation could involve any person who has an estate or interest in land or other property taken for remediation or revitalisation purposes or who was injuriously affected (permanent depreciation in the value of any retained land) or who otherwise suffered any loss from government action being compensated in the same manner as under the Public Works Act – at market rates.

*Option three: Enhanced compensation*

- 60 It would also be possible to provide for enhanced compensation, for example a 10% premium, to encourage people to accept the compensation offered without further dispute (saving on transaction costs). Such a compensation regime may provide additional stimulation to the Canterbury economy though it would come at an additional cost to government finances. Such a premium may be a reasonable trade-off to justify limiting the extent of the usual rights of the affected person to participate in or appeal the decision to acquire or to prevent the act of taking before compensation has been determined and paid.

***When should compensation be assessed?***

- 61 One question which applies to all options above is the date at which compensation should be assessed. Options include the date of taking, or as at 3 September 2010 or at 21 February 2011. The date of taking is the normal point for assessing compensation. This reflects the true value of the interest in land that the Crown is acquiring, and what the owner could otherwise have obtained in a private sale.
- 62 In the present circumstances this would mean that in some cases the value of the land (and thus the compensation payable) would be significantly reduced, because some land (eg land affected by liquefaction) may be considerably less valuable as a result of the damage caused by the 2010 and 2011 earthquakes and insurance may not have been payable.
- 63 A compensation framework will also need to take account of issues of betterment and insurance to prevent windfall gains as much as possible. Assessment as at the date of taking would reflect the extent to which property was undamaged and avoid paying compensation for loss that was or ought to have been insured. For example, compensation should not include the value of a building destroyed in the earthquake or aftershock, which ought to have been covered by insurance, but should include the value of an undamaged building acquired.
- 64 We recommend the legislation outline the orthodox approach, ie, option two. This would mean compensation would be payable at the market value at the date of taking, and would also reflect the extent to which property was undamaged and avoid paying compensation for loss that was or ought to have been insured. It would also mean not factoring in the impact on value of any Recovery Plan with regard to the future use or status of that land.

## **Offer back**

- 65 The former owners of land taken under the Public Works Act are ordinarily entitled to have the land offered back to them if and when the land is no longer required for a public work. Consideration needs to be given to whether such a right is appropriate here, given for example that these works will be to recover a whole community from a natural disaster rather than to initiate a new project. One complication may be that the title boundaries and land use framework may be varied significantly. (This is proposed to be dealt with in terms of powers relating to the issuing of titles under the Land Transfer Act 1952.) Due to where title boundaries are more likely to be changed and the unique reasons for taking the land in the first place (which may include an intention to develop and resell the land), it is proposed that there be no offer back for commercial land and to the former owners only in respect of residential land. We recommend the legislation outline this.
- 66 A similar question could arise with respect to the right of first refusal under the Ngai Tahu Claims Settlement Act 1998. In order to permit a focused and timely recovery process for Christchurch, it may not be appropriate to continue to apply the right of first refusal under that Act in respect of any relevant land over which the Crown wishes to transfer to other parties. Yet it is not evident whether any such relevant land will be affected in such a way to activate the relevant provisions of the Ngai Tahu settlement legislation. That will only become evident once the Recovery Strategy and Recovery Plans are prepared and decisions are taken affecting any such relevant land. We recommend that the legislation provide a process for discussions between the Minister and Ngai Tahu.

## **Other forms of loss caused by Government**

- 67 The question of compensation is not limited to acquiring land. While the compulsory acquisition of land would normally be fully and fairly compensated, there are also other types of perceived loss that may need to be addressed. It is possible to limit or exclude other types of loss that persons might suffer. Decisions of CERA will affect individuals in a variety of ways that may leave them aggrieved and feeling that a valuable right or privilege has been taken from them. In some cases, they may seek compensation.
- 68 In particular, changes to regulatory provisions under Resource Management Act instruments (such as a district plan) will affect whether and how people are permitted to use their land. Ordinarily, changes to regulatory requirements governing the uses of land do not amount to a taking of land and do not give rise to compensation entitlements. To the extent that CERA may be changing district plan requirements (such as what activities are or, are not, permitted in a particular area), or making decisions to grant or refuse a resource consent application or impose conditions on a resource consent (even if such a condition requires the surrender of part of the land), that is unremarkable. Some might argue that such actions constitute a "regulatory taking" even if the affected rights are unexercised. However, under current law those matters do not amount to the taking of property rights.
- 69 In part the current lack of compensation for a regulatory taking is justified on the basis that individuals can participate in the relevant processes, and because they are not compelled to exercise the resource consents they obtain. In addition, the underlying property interest remains with the owner, as the regulatory change does not alter the extant property rights although it may affect the extent to which the

property-holder may exercise them practically. The appellate courts in New Zealand have generally considered statutory systems of managing natural resources, such as land, as not having the effect of extinguishing property rights. The main difference in the present circumstances is that participation rights in decision-making and appeal processes may be curtailed under the new legislation. However, we still consider that compensation should not be available in these cases and this should be made clear in the new legislation to avoid doubt.

- 70 However, the legislation will be charting new territory if it enables the cancellation of existing resource consents that have already been exercised, or the cancellation of existing use rights (the statutory rights to continue existing activities that were lawfully established before the regulatory provisions were changed to prohibit them). Persons who have such consents or rights cancelled may argue that they are being deprived of something valuable, and more akin to property, for which they should be compensated. An example is a person whose house or office has been destroyed and who still owns the land but who is no longer permitted to rebuild to the same height or use the land in the same way. The Crown may not wish to acquire the underlying land but may wish to limit or prevent the person exercising an extant resource consent for a period.
- 71 This is a more difficult issue. There may be a possibility for a Court to sympathise with arguments that such an act should be compensable on the grounds of the degree of compulsion involved, in circumstances where a person has invested time and effort in obtaining the relevant consents or occupied the area on the basis of the sorts of activities/uses previously allowed. Nevertheless, the orthodox legal position has been to treat the taking of real property (eg, fee simple title) or personal title (chattels) as compensable.
- 72 Furthermore, there could be considerable complexity in determining compensation for such regulatory takings and practical difficulties in determining appropriate valuations and compensation for a bundle of resource consents to do with a business activity (eg, discharge permits or a land use consent). The legislation will need to expressly address whether compensation should, or should not, be payable for the cancellation of existing exercised resource consents or existing use rights. We consider that no such compensation should be payable. This will need to be clarified in the legislation to avoid doubt.
- 73 We do not propose creating new compensation entitlements for other losses that persons may suffer. The new legislation would need to specify that some matters will not be compensated. For example, we consider there should be no compensation for government actions that result in:
- losses that were, or ought to have been, insured e.g. business interruption or a building that has already been destroyed and has no value (to avoid double-dipping or because that was the owners' choice);
  - economic or consequential loss e.g. the inability due to the cordon to obtain access to carry on a business or fulfil a lucrative order (because such a decision is taken in the wider interests of the community);
  - claims by insurers (because they have chosen to bear the risks);
  - losses of personal property worth more than \$20,000 which is the threshold in Civil Defence Emergency Management Act (because more valuable property may or could have been insured); and

- unwarranted and unjustified claims, with clear authority being given to reject such claims (because a residual discretion is necessary to deal with unforeseeable claims).

### ***Rights of appeal and review***

- 74 Rights of recourse to the courts, by way of appeal or judicial review, are an important component of many decision-making processes. Rights of appeal are embedded in many current statutes. The right to seek judicial review applies to all statutory powers of decision (but not to decisions of the High Court) and would apply to decisions of the CERA or the Minister. Rights to seek redress from the courts would ordinarily be expected where a decision is of a quasi-judicial nature, or otherwise directly and significantly affects rights and interests of a particular individual.
- 75 However, existing legal processes (such as the appeal and mediation processes under the Resource Management Act, Local Government Acts and Public Works Act) do not contemplate the extraordinary circumstances in greater Christchurch. Delays caused by litigation could represent a real risk to the success of the efforts to rebuild and revitalise greater Christchurch, by undermining the momentum and co-ordination that may be necessary. Rights of recourse to the courts may need to be structured so as not to unreasonably delay the delivery of certainty to greater Christchurch and its people.
- 76 A number of options are available. As to the scope of appeal and review rights, they include:
- *Option one: Allowing existing appeal and judicial review rights to continue as usual.* This provides the greatest range of rights to individuals. It also carries the greatest risk of delays holding up key decisions and actions.
  - *Option two: A truncated version of existing appeal rights.* Legislation would remove some established rights of appeal that would otherwise apply. These might include appeals over decisions under district plans under the Resource Management Act, and over decisions to take land under the Public Works Act. In that case, the fairness of compensation becomes especially important. Appeal rights could be excluded for the creation of the Strategy, and for most other decisions made by the CERA.
  - *Option three: Fair, truncated, and speedy appeal rights could be provided for a limited range of decisions,* where the significance of the effects of a particular decision means that independent and robust legal scrutiny is desirable. For example: Compulsory acquisition of land and interests in land (in particular, the quantum of compensation but not the decision to take).
- 77 It is not desirable to seek to exclude courts entirely from scrutiny of decisions where their involvement may be normally expected. That would be likely to significantly reduce public confidence in legitimacy of decision-making. Limiting appeal rights significantly may also encourage disaffected individuals to pursue judicial review, which would create greater delays than a speedy appeal process would provide. Nonetheless, we propose that Option three is adopted because of the special circumstances applying to the recovery.

- 78 There are also options as to the *appropriate body to determine appeals from decisions made by CERA or the Minister*. They include:
- *Option one: Using a specialist tribunal* (creating a new one or modifying an existing one). Such a process could be a way of including specialist experts, or local representatives, where desirable. It may be designed to be informal and quick. However, unless legislation provided otherwise, its decisions would still be able to be judicially reviewed in the High Court.
  - *Option two: Providing for all appeals on decisions by CERA or the Minister to be made direct to the High Court*, with the Court being given adequate resources and processes (whether formal or informal) to enable claims to be heard expeditiously and with a minimum of procedural delay so as to provide a fair yet speedy level of protection for those affected. An advantage of having appeals heard directly by the High Court is that decisions of the High Court are not subject to judicial review, so cannot give rise to separate proceedings. However, it would be appropriate to provide a right of further appeal to the Court of Appeal, limited to questions of law.
- 79 Option two is the preferred approach. The Attorney-General has consulted with the Chief Justice on this approach.
- 80 It is proposed the legislation will stipulate that *appeals over council decisions* on resource consents granted or declined, or notices of requirement granted, pursuant to the provisions of a Recovery Plan, *will be to the High Court*. The High Court would be provided with an ability to supplement its Resource Management Act knowledge and decision making skills though being able to invite an Environment Commissioner or other expert as required to sit alongside a High Court Judge hearing appeals on a resource consent decisions. The High Court would not hear matters de novo.
- 81 We also propose that notices of appeal to the High Court and Court of Appeal be required to be filed within a truncated time period. The usual time period is 20 working days. In light of the circumstances and the need for timely decision making we propose that this be truncated to either 5 or 10 working days. We also understand it would be possible to provide that the administrative decision being appealed would stand unless and until it is set aside. This means that:
- the timing of the judicial process would not hold up implementing a decision even if it is challenged; and
  - it would give other parties and the courts incentives to be efficient in their decision making processes.
- 82 There is not ordinarily any time limit on bringing judicial review proceedings but the courts take into account the time proceedings are brought when deciding on relief in a successful review. In some limited situations where judicial review could be used simply to delay actions, such as immigration decisions, time limits have been imposed. In relation to some of the decisions to be taken under the new legislation it could be considered important to provide certainty about the time limits for challenge. That could be done by providing that any review proceedings in respect of a statutory power of decision arising under the legislation must be commenced not later than 3 months after the date of the decision, unless the High Court decides



that, by reason of special circumstances, further time should be allowed. However some may argue that:

- significant powers are being conferred under this legislation and judicial review is the primary non-political check on them;
- the courts can and usually do manage urgent or vexatious judicial review applications reasonably efficiently;
- providing a time limit on judicial review does nothing to stop urgent judicial reviews seeking interim injunctions, which is likely to be the main impediment to actions government wants to take;
- the time when judicial reviews are brought are and can be taken into account by a court when considering whether, and what sort of, relief should be granted; and
- providing a time limit could encourage more judicial review proceedings to be taken in order to meet the time limit.

83 Given these considerations there is a choice between not placing any particular time related limitations on judicial reviews or imposing time limits on when judicial review actions can be brought. Because of the importance of timeliness and need for urgency to achieve an effective recovery, we propose that in general any judicial review action must be commenced not later than 3 months after the date of the decision.

### **Checks on powers**

84 Checks will be in place to guard against the inappropriate use of the powers given to the Minister and CERA. The primary check will be the requirement that the exercise of any powers granted to the Minister or CERA by legislation will be required to be for the specified purposes of the legislation, only exercised where the Minister or CERA reasonably considers it necessary. The intention is that many powers will only be used if other parties are not appropriately implementing the Recovery Strategy or the Recovery Plans. In addition, the powers provided to the Minister and CERA will only be for the duration of the legislation, which is a maximum of five years and reviewable after three years.

### *Review Panel*

85 A review Panel, as described in the companion paper will review and advise on draft Orders in Council proposed by Ministers to relax, suspend or extend legislative provisions that might be impacting on the recovery effort. It will provide a valuable function in providing independent scrutiny of proposed Orders in Council.

### *Involvement of community interests*

86 The Minister will be assisted by hearing directly from local interests. Two mechanisms are proposed to ensure there is a direct expression of local interests to the Minister.

87 The cross-party parliamentary forum, described in the companion paper, will assist in coalescing issues for recovery of Greater Christchurch from the 4 September and 22 February earthquakes in a cooperative manner.

88 The community forum, also described in the companion paper, will assist in providing community interests with an opportunity to raise issues and provide advice direct with the Minister.

#### *Transparency of decision making*

89 In order to ensure transparency and openness of decision making processes CERA will be subject to the Official Information Act 1982. This is outlined in the companion paper.

#### **The role of local government**

90 Local government has a significant role to play in the recovery effort. We expect that there will be a spirit of collaboration between CERA and the Christchurch City Council, Selwyn District Council, Waimakariri District Council and Environment Canterbury. We anticipate that the local authorities will:

- continue to be responsible for their own infrastructure (such as local roads, water (drinking, waste and storm), land, parks and reserves – under CERA direction, where necessary;
- continue business as usual activities that are agreed not to have been directly affected by the earthquake, including their regulatory responsibilities;
- provide information to CERA through their community and business networks;
- provide collaborative support to CERA in planning (for instance, the Christchurch City Council will lead the development of the Christchurch CBD Recovery Plan);
- be formally consulted, as a requirement for agreement to the Recovery Strategy, and support CERA in consulting on the Recovery Strategy;
- implement Recovery Strategy activities for which they are responsible;
- maintain their responsibilities under the Civil Defence Emergency Management Act - under CERA direction, where necessary, if related to earthquake recovery (but not in the circumstance of another state emergency).

#### **Next Steps**

91 There may be a range of further detailed policy decisions required in order to develop a new legislation giving effect to the framework proposed in this paper. We recommend a small Ministerial group (Prime Minister, Deputy Prime Minister, Minister for Canterbury Earthquake Recovery and Minister for State Services) to make further policy decisions prior to Cabinet reviewing the draft legislation.

92 Discussions with key stakeholders will be ongoing so that they are aware of the government's plans and their own recovery plans and actions can be coordinated with those of government.

#### **Consultation**

93 The following departments have been consulted in the development of this paper: Crown Law Office, Department of Building and Housing, Department of Internal Affairs, Department of Conservation, Department of Labour, Ministry of Justice, Te Puni Kokiri, Ministry of Transport, Land Information New Zealand, Ministry for

Culture and Heritage, Ministry of Economic Development, Ministry for the Environment, Ministry of Education, Ministry of Health, Ministry of Social Development and the Treasury.

- 94 The Department of the Prime Minister and Cabinet has been informed.
- 95 The Chief Executive of the Christchurch City Council has reviewed an earlier version of this paper. The Minister for Canterbury Earthquake Recovery has discussed the contents of this paper with the Mayors of Christchurch City and Waimakariri District and the Chair of Environment Canterbury and their views have been taken into account.
- 96 The Chair of the Canterbury Earthquake Recovery Commission has been consulted and his views taken into account.
- 97 The Parliamentary Counsel Office has been informed.

### **Financial implications**

- 98 Financial implications for the establishment of CERA and other policy decisions are covered in the companion paper.

### **Human rights**

- 99 The proposals in the paper appear to have human rights implications but have not been developed in sufficient detail to determine whether any limitations on rights or freedom affirmed in the New Zealand Bill of Rights Act 1990 (NZBORA) would be justified under section 5 of that Act. Such a determination will be possible once the legislation has been drafted.
- 100 In particular, that assessment will need to consider the consistency of the proposals with the right to natural justice affirmed in section 27(1) of NZBORA. The proposal to truncate or remove appeal rights (in respect of compulsory acquisition, resource management decisions and decisions related to heritage buildings, archaeological sites and wahi tapu) could limit that right. In the absence of further detail, it is difficult to assess whether the right to natural justice would be limited and whether the limitation would be justified. That assessment will depend on whether the process remains fair and gives applicants an adequate chance to be heard.
- 101 Other provisions of NZBORA that might be engaged include:
- A power to close roads and restrict access to certain areas could limit the freedom of movement affirmed in section 18 of NZBORA but is likely to be justified provided there are reasonable grounds to do so in the particular circumstances.
  - The ability to enter and inspect properties will engage the right to be free from unreasonable search and seizure affirmed in section 21 of NZBORA but also appears to be reasonable depending on the exact nature of the power and the circumstances of the particular entry and inspection.

102 The State Services Commission, and other relevant agencies, will work with the Ministry of Justice while the legislation is drafted to ensure that it is consistent with the rights and freedoms affirmed in NZBORA.

### **Legislative implications**

103 Legislation will be required to give effect to the recommendations outlined in this paper. It is proposed that Ministers agree:

- to the inclusion of a Canterbury Earthquake Rebuilding and Recovery Bill (working title only) in the 2011 Legislation Programme; and
- that the Canterbury Earthquake Rebuilding and Recovery Bill have a category 2 priority.

104 It is recommended that the new legislation will include a provision that will bind the Crown.

### **Regulatory impact analysis**

#### *Regulatory Impact Analysis requirements*

105 The Regulatory Impact Analysis (RIA) requirements apply to the proposals in this paper and a Regulatory Impact Statement (RIS) has been prepared under short timeframes and is attached.

#### *Quality of Impact Analysis*

106 The Regulatory Impact Analysis (RIA) requirements apply to the proposal in this paper and a Regulatory Impact Statement (RIS) has been prepared and is attached.

107 The Regulatory Impact Analysis Team (RIAT) has reviewed the RIS prepared under urgency by the State Services Commission and associated supporting material, and considers that the information and analysis summarised in the RIS partially meets the quality assurance criteria.

108 This RIS was drafted under significant time pressures with very limited access to the information that would be needed for a comprehensive regulatory impact analysis. In the circumstances the RIS highlights some of the key uncertainties, risks and trade-offs inherent in the decisions to be taken, but there are gaps in the impact analysis that make it difficult to judge whether the proposed option is proportionate to the problem.

#### *Consistency with Government Statement on Regulation*

109 We have considered the analysis and advice of officials, as summarised in the attached RIS and we are satisfied that, aside from the risks, uncertainties and caveats already noted in this Cabinet paper, the regulatory proposals recommended in this paper:

- Are required in the public interest;
- Make best endeavours to deliver the highest net benefits of the practical options viable; and

- Are consistent with the commitments in the Government Statement on Regulation.

### **Gender implications**

110 There are no gender implications arising from this paper.

### **Disability Perspective**

111 There are no issues from a disability perspective arising from this paper.

### **Publicity**

112 The companion paper outlines the proposed publicity arrangements for the contents of this paper.

### **Recommendations**

113 We recommend that the Ad Hoc Cabinet Committee on Canterbury Earthquake Recovery:

#### **BACKGROUND**

1. **note** that the Canterbury Earthquake Response and Recovery Act 2010 (CERR Act) expires on 1 April 2012 and so do any Orders in Council that have been made under it;

#### **THE NEED FOR LEGISLATION**

2. **note** that legislation will need to be introduced into the House to give effect to the policy decisions arising from the below recommendations;
3. **agree** that the legislation will repeal the CERR Act (which will also disestablish the Canterbury Earthquake Recovery Commission) and once enacted stand alone as a new piece of primary legislation;
4. **agree** that the new legislation will validate those things done under the repealed CERR Act and continue in effect Orders in Council made under that Act with extended timeframes as appropriate;
5. **agree** any acts or decisions under current Orders in Council will be validated as if they were approved under the new legislation;

#### **PURPOSE OF THE NEW LEGISLATION**

6. **agree** that the purpose of the new legislation will be based on the following points:
  - 6.1. the provision of appropriate measures to ensure greater Christchurch and its communities respond to and recover from the impacts of the earthquakes of 4 September 2010 and 22 February 2011, including aftershocks, and any subsequent events (the events);

- 6.2. the Minister and Canterbury Earthquake Recovery Authority (CERA) to be provided with adequate statutory functions and powers to assist with the recovery from the impacts of the events;
- 6.3. there is the ability, by Order in Council, to relax or suspend, grant an exemption from, or modify, or extend any provision of any enactment to facilitate the planning, rebuilding and recovery of affected communities, including the repair and rebuilding of community infrastructure and other property to enable a focused, timely and expedited recovery from the effects of the events;
- 6.4. enable the gathering of information about any structure or any infrastructure affected by the events that is relevant to how to minimise the damage caused by the events;
- 6.5. restoration of social and economic well-being of greater Christchurch communities following the events;

## POWERS AND ACTIVITIES

### OVERARCHING FACTORS TAKEN INTO ACCOUNT IN DEVELOPMENT OF POWERS

7. **note** that in considering the powers to be conferred on the Minister for Canterbury Earthquake Recovery and/or the CERA, the following factors have been taken into account:
  - 7.1. All powers will be required to be exercised for the specific purposes of the legislation, where the Minister or CERA reasonably consider them necessary;
  - 7.2. Current roles and responsibilities of all parties are regarded as the default position;
  - 7.3. Proposed powers have been tested against a series of questions as set out in the Legislation Advisory Committee guidelines;
  - 7.4. Consideration has been given to the potential trade-off between speed of decision making and public participation in that decision making;
  - 7.5. To be transparent by specifying the powers in legislation as much as possible;
  - 7.6. the need for a timely and coordinated ongoing recovery effort of Christchurch and the greater region (greater Christchurch) which is described as encompassing the area covered by three territorial authorities (Christchurch City Council, Selwyn District Council, and Waimakariri District Council);

### ORDER IN COUNCIL PROCESS REQUIRED IN NEW LEGISLATION

8. **note** that it is not possible to identify or anticipate every power that the Minister for Canterbury Earthquake Recovery and/or CERA will require during the recovery efforts;

9. **agree** that the new legislation include the ability for relevant Ministers to recommend to Executive Council an Order in Council, as was provided for in the CERR Act;

POWERS TO BE CONFERRED ON MINISTER AND/OR CERA

10. **agree** that any powers conferred under the new legislation must be exercised in accordance with the purpose of the new legislation, where the Minister (or CERA) either:

10.1. reasonably considers the power(s) to be necessary; or

10.2. reasonably considers the power(s) to be necessary **and** exercised proportionately, in the decision-maker's opinion, with the nature of the problem being addressed;

11. **agree** to the following set of powers to be conferred on the Minister for Canterbury Earthquake Recovery and/or CERA:

11.1. The ability to obtain or require information from any source, including the commissioning of reports may be exercised by either:

11.1.1. the Minister for Canterbury Earthquake Recovery; or

11.1.2. CERA;

11.2. The ability to investigate matters relating to the recovery effort may be exercised by either;

11.2.1. the Minister for Canterbury Earthquake Recovery; or

11.2.2. CERA;

11.3. powers to enter onto land, remove fixtures and fittings, perform work on land, construct structures on or under that land, leave and maintain structures on or under that land and register its interest in those structures may be exercised by either:

11.3.1. the Minister for Canterbury Earthquake Recovery (and those authorised); or

11.3.2. CERA (and those authorised);

11.4. the ability to survey and subdivide and use these powers to assist with land remediation or for other reasons as required may be exercised by either:

11.4.1. the Minister for Canterbury Earthquake Recovery; or

11.4.2. CERA;

- 11.5. CERA to have powers of a body corporate, including the power to enter into contracts;
- 11.6. Minister for Canterbury Earthquake Recovery may authorise the erection of temporary structures or buildings on public reserves, private land, roads and streets, and provide for their removal;
- 11.7. the power of entry and removal, including demolition powers for commercial and possibly residential demolition project (both in CBD and suburbs) may be exercised by either:
- 11.7.1. the Minister for Canterbury Earthquake Recovery; or
  - 11.7.2. CERA;
- 11.8. the power to require land to be temporarily vacated so work can be coordinated (which may involve buildings being demolished) may be exercised by:
- 11.8.1. the Minister for Canterbury Earthquake Recovery; or
  - 11.8.2. CERA;
- 11.9. the discretionary power to close roads and divert traffic may be exercised by either:
- 11.9.1. the Minister for Canterbury Earthquake Recovery; or
  - 11.9.2. CERA;
- 11.10. Minister for Canterbury Earthquake Recovery may stop roads and no compensation will be payable;
- 11.11. Minister for Canterbury Earthquake Recovery may restrict access to specified areas and buildings;
- 11.12. Minister for Canterbury Earthquake Recovery may require either:
- 11.12.1. any person, a local authority or council organisation to take any action necessary to achieve the purpose of the Act and the functions conferred on the Minister under the Act; or
  - 11.12.2. a local authority or council organisation to take account any action necessary to achieve the purpose of the Act and the functions conferred on the Minister under the Act;
- 11.13. Minister for Canterbury Earthquake Recovery may require either:
- 11.13.1. any person, a local authority or council organisation to stop taking any action or making a decision that is contrary to the purpose of the Act and the functions conferred on the Minister or CERA under the proposed CERA Act or any other Act; or



- 11.13.2. a local authority or council organisation to stop taking any action or making a decision that is contrary to the purpose of the Act and the functions conferred on the Minister or CERA under the proposed CERA Act or any other Act.
- 11.14. Minister for Canterbury Earthquake Recovery may direct Registrar-General of Land to seek adjacent owner(s) consent to new survey definition of parcels of land within a certain time period and, if no consent is forthcoming, to move into truncated dispute resolution process;
- 11.15. Minister for Canterbury Earthquake Recovery may direct Registrar-General of Land to issue titles limited as to parcels where property boundaries materially affected by earthquake movement are being redefined (by the deposit of a new survey plan under s167 of the Land Transfer Act) upon the application of a landowner or CERA, without having been approved by adjoining owners or consented to by existing registered lessees, mortgagees (etc).
- 11.16. Minister for Canterbury Earthquake Recovery may direct the chief executive of Land Information New Zealand to approve surveys that have new survey definitions, following consultation with the Surveyor-General to examine the future or unintended consequences for other landowners;
- 11.17. Minister for Canterbury Earthquake Recovery may disapply application of section 205(4) of the Land Transfer Act which allows an adjacent owner or occupier of land who did not consent to deposit of the relevant plan to lodge a caveat, notifying their claim to title for part of the redefined land;
- 11.18. the ability to collate and disseminate information about infrastructure, structures (including buildings), any property, and community services, damaged or otherwise affected may be exercised by either:
- 11.18.1. the Minister for Canterbury Earthquake Recovery; or
- 11.18.2. CERA;
- 11.19. the ability to approve any local government contract, over a certain threshold etc, if necessary (this power would be similar to one the Auckland Transition Agency had) may be exercised by either:
- 11.19.1. the Minister for Canterbury Earthquake Recovery; or
- 11.19.2. CERA;
- 11.20. the ability to suspend, amend, cancel, delay, any council plans and policies (e.g. development contributions policies) may be exercised by;
- 11.20.1. the Minister for Canterbury Earthquake Recovery; or
- 11.20.2. CERA;
- 11.21. Minister for Canterbury Earthquake Recovery will be able to 'call-up' and exercise any functions, rights or responsibilities and associated powers,

whether in whole or in part, when this is considered necessary to achieve the purposes of the new legislation from either:

- 11.21.1. any local authority and council organisation; or
  - 11.21.2. any local authority, council organisation and any other natural person; and
  - 11.21.3. only after the Minister is satisfied that the decision-maker has not complied with a previous notice requiring a particular decision-making process to be undertaken within a specified time period;
- 11.22. the administration and monitoring of the overall effect of the legislation will be exercised by either:
- 11.22.1. the Minister for Canterbury Earthquake Recovery; or
  - 11.22.2. CERA;
12. **agree** that any liability of the Minister for Canterbury Earthquake Recovery and CERA for damage and nuisance, except through negligence, will be excluded;
  13. **agree** that the Minister for Canterbury Earthquake Recovery and CERA will have all the protections that councils have under the Building Act 2004 in relation to any liability issues or demolition costs relating to the demolition of buildings in circumstances where the Minister/CERA become parties to any council agreements or arrangements for the deconstruction and/or demolition of buildings;
  14. **agree** that the Minister for Canterbury Earthquake Recovery and CERA will have the protections provided to the Crown under the Civil Defence Emergency Management Act 2002 in relation to any liability or costs arising out of or related to demolition.
  15. **agree** where the Minister for Canterbury Earthquake Recovery has used a power to take over responsibilities for activities normally undertaken by a local authority or council organisation, this power will be relinquished once the Minister is satisfied the need for it has passed and responsibility will revert to the relevant local authority or council organisation;
  16. **note** it will be important for all parties to participate in the recovery efforts as appropriate in order to effect a timely and co-ordinated recovery effort;
  17. **note** that the powers conferred on the Minister for Canterbury Earthquake Recovery can be delegated to the Chief Executive of CERA;

## PLANNING FOR THE RECOVERY OF GREATER CHRISTCHURCH

### OVERVIEW OF PLANNING PROCESS

18. **note** that the planning for the recovery of greater Christchurch region will set the overall direction for the recovery efforts and a series of more detailed plans that will set out the detail of what needs to be done and how it will be implemented;
19. **note** that there will be a need to make decisions (e.g., concerning land condition future use) before the Long-Term Recovery Strategy and Recovery Plans are in place and the planning arrangements will need to take this into account;

### THE LONG-TERM RECOVERY STRATEGY

20. **agree** that the new legislation will provide for CERA to prepare an over-arching Long-Term Recovery Strategy (the Recovery Strategy) for the reconstruction and rebuilding of greater Christchurch;
21. **agree** the Recovery Strategy will be prepared in collaboration with Christchurch City Council, and where appropriate with Environment Canterbury, Selwyn District Council, and Waimakariri District Council, Ngai Tahu, and other parties deemed necessary;
22. **agree** a draft of the Recovery Strategy will be prepared within three months of the enactment of the new legislation for consultation (which will include a process that incorporates an opportunity for public input through written submissions and a series of hearings);
23. **agree** the Minister for Canterbury Earthquake Recovery will approve the Recovery Strategy, subject to Cabinet's consideration and the Recovery Strategy must be gazetted;
24. **agree** that relevant parts of the Recovery Strategy be immediately incorporated to the extent necessary into the Long Term Plans of relevant councils;
25. **agree** the Recovery Strategy will also form part of the triennial agreements under the Local Government Act
26. **agree** that, to the extent the Recovery Strategy has a bearing on resource management issues in the region, it will have immediate force and will be deemed to be immediately incorporated into the regional policy statement for Canterbury region, and the relevant regional plans and other statutory plans without further formal statutory process;

### RECOVERY PLANS

27. **agree** that the Minister for Canterbury Earthquake Recovery is able to require, as necessary, the preparation of Recovery Plans by CERA, councils, or other bodies, authorities (including requiring authorities and network utility operators), or entities.
28. **note** that Recovery Plans may cover any social, economic, cultural, infrastructural or environmental matter or combination thereof;

29. **agree** that Recovery Plans may be area-specific, or apply to the entire greater Christchurch area;
30. **agree** that the Recovery Plan for the Christchurch Central Business District (CBD), to be led by the Christchurch City Council (including community engagement) with input from CERA, Ngai Tahu and other parties deemed necessary should be produced within nine months of enactment;
31. **agree** that the CBD Recovery Plan preparation process will incorporate a public process that allows for input by way of submissions and a streamlined hearing process;
32. **agree** that a schedule for other Recovery Plans will be determined by the Minister for Canterbury Earthquake Recovery and notified in the Gazette and may be modified by the Minister as required;
33. **note** that a Recovery Plan may be prepared in advance of the Recovery Strategy, but must be reviewed for consistency with the Recovery Strategy once the Recovery Strategy is approved
34. **agree** that the Minister for Canterbury Earthquake Recovery will have discretion to determine the process to be followed in preparing each Recovery Plan having regard to:
- 34.1. nature and scope of the Recovery Plan;
  - 34.2. needs of people affected by it;
  - 34.3. funding implications and sources of funding;
  - 34.4. need to act expeditiously;
  - 34.5. need to ensure that the Recovery Plan is not inconsistent with other existing Recovery Plans; and
  - 34.6. impact and effect of the Recovery Plan.
35. **agree** that the Minister for Canterbury Earthquake Recovery approves Recovery Plans and these plans must be gazetted;
36. **agree** that there is no right of appeal in respect of decisions made to approve Recovery Plans
37. **agree** that all or part of a Recovery Plan will have immediate legal effect from the date the Recovery Plan is approved or a date specified in the Plan with respect to plans and planning processes under the Reserves Act 1977, the Resource Management Act 1991, the Local Government Act 2002 and the Land Transport Management Act 2003;
38. **agree** that, to the extent a Recovery Plan has a bearing on resource management issues in the region, it will have immediate force and will be deemed to be immediately incorporated into the regional policy statement for Canterbury region,

and the relevant regional plans and other statutory plans without further formal statutory process;

39. **note** that resource consents will only be granted by councils if the application is consistent with the relevant Recovery Plan
40. **note** that existing planning documents must not be inconsistent with relevant Recovery Plans
41. **agree** that councils must make changes to existing statutory documents to make them consistent with relevant Recovery Plans
42. **note** that CERA will monitor the implementation of the Recovery Strategy and Recovery Plans, in conjunction with relevant councils
43. **agree** that the new legislation will provide that where any local authority or council organisation is not exercising or performing its functions under a Recovery Plan the Minister for Canterbury Earthquake Recovery may call-in functions or appoint a person, persons or other entity to perform such functions

#### **OTHER PROVISIONS**

44. **agree** that the new legislation will include the following set of provisions:
  - 44.1. a penalty or enforcement section that requires compliance with the directions given under the powers and that would make it an offence to refuse to follow a lawful direction in the exercise of the powers, and enable the Minister and /or CERA to obtain an ex-parte enforcement order from the High Court;
  - 44.2. an immunity from liability clause for the Minister and/or employees of CERA acting in good faith when exercising or carrying out the powers;
  - 44.3. a requirement to consider alternatives, assess benefits and costs when approving a Recovery Plan;
  - 44.4. prior to approval of the Recovery Strategy, the Minister to lay before the House, at no less than quarterly intervals, a report on the operation of the statutory powers and include in the report a description of what powers have been exercised;

#### **EXTENT OF POWERS**

45. **note** that CERA will not be able to rate or direct local authorities to rate;
46. **note** that if another emergency occurs in greater Christchurch the Civil Defence Emergency Management framework will prevail for the response period and any recovery from that event would fall within the new framework outlined in this paper;

#### **COMPENSATION**

47. **note** that the power to compulsorily acquire land and interests in land (including fixtures such as buildings) and demolish or rebuild buildings or change the use of

an area will be necessary in some cases to assist in the task of rebuilding and revitalising greater Christchurch.

48. **agree** that legislation will need to broaden the purposes for which interests in land may be taken accordingly;
49. **agree** that compulsory acquisition of land or interests in land (including fixtures such as buildings) be the subject of full compensation at market value;
50. **agree** that the quantum of compensation be assessed as at the date of taking in order to reflect the value of what is taken (but not what was lost in the previous earthquakes, which may or ought to have been insured);
51. **agree** that for land in the CBD, former owners should not have a right to be offered back compulsorily acquired land or an interest in land if it is no longer required for recovery;
52. **agree** that for residential land not in the CBD, former owners should have a right to be offered back compulsorily acquired land or an interest in land if it is no longer required for recovery and is being made available again for residential land;
53. **agree** that the new legislation provide for discussions between the Minister for Canterbury Earthquake Recovery and Ngai Tahu if any land which the Crown wishes to transfer to other parties is relevant to the Ngai Tahu Claims Settlement Act 1998;
54. **agree** that the new legislation that compensation should not payable for the consequences of regulatory changes that cause loss because, even though participation rights in such changes may be lessened, these changes are in the wider interests of Greater Christchurch;
55. **agree** that compensation should not be payable for the cancellation of an existing resource consent that has already been exercised, or the cancellation of an existing use right;
56. **agree** to the following exceptions to any compensation regime:
  - 56.1. losses that were, or ought to have been, insured e.g. business interruption or an already destroyed building (to avoid double dipping or because that was the owner's choice);
  - 56.2. economic or consequential loss e.g. the inability due to the cordon to obtain access to carry on a business or fulfil a lucrative order;
  - 56.3. claims by insurers (because they have chosen to bear the risks);
  - 56.4. losses of property worth more than \$20,000 which is the threshold in CDEMA (because more valuable property may or could have been insured);  
or
  - 56.5. otherwise unwarranted and unjustified claims, with clear authority being given to reject such claims (because a residual discretion is necessary to deal with unforeseeable claims).

## RIGHTS OF APPEAL AND REVIEW

57. **note** that rights of recourse, by way of appeal or judicial review, are an important component of many decision-making processes
58. **note** that providing appeal rights to individuals could delay decisions related to the recovery of Christchurch;
59. **agree** that fair, truncated and speedy appeal rights should exist only in relation to:
- 59.1. the amount of compensation following compulsory acquisition of land and interests in land (and not the compulsory acquisition itself);
  - 59.2. Council decisions on resource consents and notices of requirement that must be consistent with Recovery Plans; and
  - 59.3. established rights of appeal that would otherwise apply (which are substituted by the above until the expiration of the new legislation);
60. **agree** that in order to ensure that appeal rights are fair, truncated and speedy:
- 60.1. the limited appeals above be heard by the High Court with the ability to sit with other experts as necessary to deal effectively with an issue;
  - 60.2. the High Court will be given adequate resources in order to act expeditiously and with a minimum of delay;
  - 60.3. there be a limited right of further appeal to the Court of Appeal on points of law (and, on other points if necessary in the interests of justice);
61. **agree** that:
- 61.1. notices of appeal to the High Court and Court of Appeal be required to be filed within either:
    - 61.1.1. 5 working days; or
    - 61.1.2. 10 working days;
  - 61.2. an administrative decision being appealed will stand unless and until it is set aside by a court.
62. **note** the Attorney-General has consulted with the Chief Justice on recommendation 60 ;
63. **agree** that other statutory powers of decision, including those by the Minister and CERA, will be subject to potential challenge by judicial review, and that this is an important check on the powers conferred upon the Minister and CERA;

64. **Either:**

- 64.1. **agree** that any judicial review proceedings in respect of a statutory power of decision arising under the legislation must be commenced not later than 3 months after the date of the decision, unless the High Court decides that, by reason of special circumstances, further time should be allowed; or
- 64.2. **agree** that any judicial review proceedings in respect of a statutory power of decision arising under the legislation should be available on the same terms as they are in respect of most other statutory powers of decision;

**CHECKS ON POWERS**

65. **note** that there will be a range of checks and balances in place to guard against the inappropriate use of the powers including:
- 65.1. that the exercise of such powers will be required to be for the specified purposes of the legislation and only exercised where the Minister for Canterbury Earthquake Recovery or CERA reasonably considers it necessary;
- 65.2. through the establishment of a Review Panel, to be appointed on the recommendation of the Minister for Canterbury Earthquake Recovery, to provide independent scrutiny of proposed Orders in Council
- 65.3. through the establishment of two forums (cross-party parliamentary and community) to provide advice to the Minister for Canterbury Earthquake Recovery on the recovery efforts;
- 65.4. through CERA being subject to the Official Information Act 1982;

**LEGISLATION PRIORITY**

66. **agree** that the new legislation will include a sunset provision of 5 years (with a review at 4 years);
67. **agree** that the new legislation will include a provision that will bind the Crown;
68. **agree** to the inclusion of a Canterbury Earthquake Rebuilding and Recovery Bill (working title only) in the 2011 Legislation Programme;
69. **agree** that the Canterbury Earthquake Rebuilding and Recovery Bill have a category 2 priority;

**NEXT STEPS**

70. **invite** the Minister for Canterbury Earthquake Recovery to issue drafting instructions to Parliamentary Counsel;



71. **authorise** the Prime Minister, the Deputy Prime Minister, the Minister for Canterbury Earthquake Recovery and the Minister of State Services to make consequential policy decisions which are consistent with the overall approach of the above recommendations, including reviewing who (Minister for Canterbury Earthquake Recovery and/or CERA) should exercise the powers outlined in recommendation 11.

Hon Gerry Brownlee  
**Minister for Canterbury Earthquake Recovery**

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Hon Tony Ryall  
**Minister of State Services**

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Released by the Minister for Canterbury Earthquake Recovery