IN THE SUPREME COURT OF NEW ZEALAND

SC 5/2014
[2015] NZSC 27

BETWEEN	QUAKE OUTCASTS Appellants
AND	THE MINISTER FOR CANTERBURY EARTHQUAKE RECOVERY First Respondent
	THE CHIEF EXECUTIVE OF THE CANTERBURY EARTHQUAKE RECOVERY AUTHORITY Second Respondent
	FOWLER DEVELOPMENTS LIMITED Third Respondent
	HUMAN RIGHTS COMMISSIONER Intervener

SC 8/2014

BETWEEN	FOWLER DEVELOPMENTS LIMITED Appellant
AND	THE CHIEF EXECUTIVE OF THE CANTERBURY EARTHQUAKE RECOVERY AUTHORITY Respondent
	HUMAN RIGHTS COMMISSIONER Intervener

Hearing:	29, 30 and 31 July 2014
Court:	Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ
Counsel:	F M R Cooke QC, M S R Palmer QC and L J C McLoughlin-Ware for the Appellants in SC 5/2014 D J Goddard QC and A A Jacobs for the First and Second Respondents in SC 5/2014 and the Respondent in SC 8/2014 S P Rennie and J E Bayley for the Third Respondent in SC 5/2014 and the Appellant in SC 8/2014 V E Casey and M J V White for the intervener in SC 5/2014 and SC 8/2014

Judgment: 13 March 2015

JUDGMENT OF THE COURT

A **The appeal is allowed in part.**

B **There is a declaration that the September 2012 decisions relating to uninsured improved residential property owners and to vacant residential land owners in the red zones were not lawfully made.**

C **The first and second respondents in SC 5/2014 and the respondent in SC 8/2014 are directed to reconsider their decisions in light of this judgment.**

D **Leave is reserved to apply for any supplementary or consequential orders.**

E **The first and second respondents in SC 5/2014 are to pay to the appellants costs of $40,000 plus usual disbursements. We certify for three counsel.**

F **The respondent in SC 8/2014 is to pay to the appellant costs of $20,000 plus usual disbursements. We certify for two counsel.**

REASONS

McGRATH, GLAZEBROOK AND ARNOLD JJ
(Given by Glazebrook J)

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Introduction

[1] The Canterbury region suffered a series of significant earthquakes and aftershocks in 2010 and 2011. The first major earthquake was on 4 September 2010 and resulted in extensive property damage and some injuries. A further major earthquake on 22 February 2011 was particularly devastating, resulting in 185 deaths and thousands of injuries. In addition, the February earthquake caused significant

additional property damage, extensive damage to infrastructure and widespread liquefaction.

[2] After a third significant earthquake on 13 June 2011, Cabinet authorised a committee of senior Ministers to make decisions on land damage and remediation issues. On 22 June 2011, a number of decisions were recorded in a memorandum for Cabinet signed by the Hon Gerry Brownlee dated 24 June 2011. The decisions were announced to the public by the Prime Minister and the Hon Gerry Brownlee on 23 June 2011.

[3] The Cabinet committee categorised greater Christchurch into four zones according to the extent of land damage and the prospects of remediation. As well as identifying the four zones, the Cabinet committee decided that there would be an offer to purchase insured residential properties in the red zones, which were characterised by the Committee as areas where "rebuilding may not occur in the short-to-medium term".

[4] Owners of insured properties in the red zone were to be given two options:

(a) purchase by the Crown of their entire property at 100 per cent of the most recent (2007) rating valuation for the properties (land and improvements), with all insurance claims against the Earthquake Commission (EQC)[1] and private insurers to be assigned to the Crown;[2] or

(b) purchase by the Crown of the land only at 100 per cent of the most recent (2007) rating valuation for the land only component of their properties, with the owner assigning all insurance claims against the

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1 In 1993, the Earthquake Commission Act 1993 replaced the Earthquake and War Damage Commission with the Earthquake Commission (EQC). A residential home owner with a private insurance policy that includes fire insurance is insured against natural disasters by the EQC. As a result, if there is no insurance policy covering fire, there is no EQC cover. For more information on the details of EQC cover, see <www.eqc.govt.nz> and ss 18–31 of the Earthquake Commission Act.

2 This option allowed a process through which any property owners who considered that there was a material discrepancy between the 2007 rating valuations and the market value of their property (for example because of subsequent improvements) could raise their concerns.

EQC for the land to the Crown but retaining the benefit of all insurance claims relating to improvements.

[5] Property owners were to be given a nine-month period to decide whether they wanted to accept the offer. If they did accept, they could defer settlement of the purchase up to 30 April 2013.[3] Offers were subsequently made by the Canterbury Earthquake Recovery Authority (CERA) to owners of insured properties in the red zone under s 53 of the Canterbury Earthquake Recovery Act 2011 (the Act).[4]

[6] The position of owners of some other categories of property in the red zones (including of owners of uninsured improved residential properties and owners of uninsurable bare residential land) was not addressed until September 2012. In essence, the offer approved for those two groups by Cabinet was at 50 per cent of the 2007 rating value for the land component only of the properties and not the land and improvements.[5]

[7] The appellants, Quake Outcasts and Fowler Developments Ltd, issued proceedings for judicial review (heard together in the High Court) challenging the lawfulness of the 50 per cent offers, alleging that they were not made in accordance with the Act. It was also alleged that the offers were oppressive, disproportionate and that they breached the appellants' human rights.

[8] Quake Outcasts is an unincorporated group of some 46[6] individual or joint-

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3 As the expiry date for the June 2011 offer loomed, there were still over a thousand property owners who had not yet returned their signed sale and purchase agreements. Many of them were waiting for more information from insurance companies and/or the EQC. On 26 March 2012, Cabinet authorised the Minister to extend, as appropriate, the nine-month offer period and the final settlement date of 30 April 2013.

4 See below at [60]–[61].

5 See Cabinet Business Committee (Minute of Decision) "Canterbury Earthquake: Red Zone Purchase Offers for Residential Leasehold, Vacant, Uninsured, and Commercial/Industrial Properties" (3 September 2012) CBC Min (12) 6/3. As the title of the minute suggests, the decision dealt with offers to insured residential leasehold properties occupied under perpetually renewable leases on land owned by the Waimakariri District Council, commercial/industrial properties and residential properties with no insurance (vacant land and uninsured properties with improvements).

6 The High Court and Court of Appeal judgments record that Quake Outcasts comprises 46 individual or joint-owners: see *Fowler Developments Ltd v Chief Executive of the Canterbury Earthquake Recovery Authority* [2013] NZHC 2173, [2014] 2 NZLR 54 (Panckhurst J) [*Quake Outcasts* (HC)] at [8] and *Minister for Canterbury Earthquake Recovery v Fowler Developments Ltd* [2013] NZCA 588, [2014] 2 NZLR 587 (O'Regan P, Ellen France and Stevens JJ) [*Quake Outcasts* (CA)] at [9]. However, at the hearing Mr Cooke QC, counsel for Quake Outcasts,

owners of uninsured improved properties, or vacant land[7] in the red zone. Fowler Developments is a property development company and is the owner of 11 residential sections in Brooklands, which was zoned red in November 2011.[8]

[9] Quake Outcasts and Fowler Developments largely succeeded in the High Court. Panckhurst J held that the June 2011 decision creating the red zones was not lawfully made.[9] The Minister's announcement of the September 2012 decision and the 50 per cent offers made pursuant to that decision were set aside.[10]

[10] The Court of Appeal allowed the Crown's appeal in relation to the June 2011 decision.[11] The Court of Appeal did not see it as appropriate to provide relief in respect of the Minister's announcement of the September 2012 decision.[12] The September 2012 offer to purchase the properties of owners of vacant land and owners of uninsured improved properties in the red zone was, however, held to be unlawful because of non-compliance with the Act and in particular s 10 of that Act.[13] The Court of Appeal made a declaration to that effect.[14] The Court accepted, however, that there was a rational basis for distinguishing between property owners on the basis of their insurance cover.[15]

[11] On 5 May 2014, this Court granted leave to appeal[16] in both cases on the following questions:

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indicated to the Court that there were 45 in the group. This discrepancy is noted but is immaterial for present purposes.

7 One or more of the group may have had uninsured commercial properties but there was no focus in the argument on the situation of commercial properties.

8 In June 2011 these sections had been zoned orange, being in an area where further work was required to determine if remedial work was feasible in the short-to-medium term.

9 See *Quake Outcasts* (HC), above n 6, at [78]. There was a subsequent costs judgment: *Fowler Developments Ltd v Chief Executive of the Canterbury Earthquake Recovery Authority* [2013] NZHC 2636 (Panckhurst J) [*Quake Outcasts* (Costs)].

10 *Quake Outcasts* (HC), above n 6, at [100]. Panckhurst J directed the Minister for Canterbury Earthquake Recovery (the Minister) and the chief executive of CERA to reach a new decision to purchase the appellants' properties in accordance with the principles of the Canterbury Earthquake Recovery Act 2011 and with regard to the reasons contained in his judgment: at [102].

11 *Quake Outcasts* (CA), above n 6, at [133].

12 At [156]–[157].

13 At [153]. The Court of Appeal stated "[w]e prefer to approach the matter by focusing on the statutory decision of the Chief Executive to which the requirements of the Act applied": at [157].

14 At [167] and [168].

15 At [150].

16 *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2014] NZSC 51.

(a) Was the establishment of the Residential Red Zones in Christchurch lawful as being a legitimate exercise of any common law powers or "residual freedom" the Crown may have, given the terms of the Canterbury Earthquake Recovery Act 2011?

(b) Were the offers made by the Crown to Residential Red Zone property owners under s 53 of the Canterbury Earthquake Recovery Act 2011 lawfully made? In particular:

(i) Was there a material failure to comply with the Act?

(ii) Was there a rational basis for the distinction drawn between those owners who were insured and those who were uninsured?

[12] Before dealing with those questions, we canvas the relevant legislation, the legislative history and the factual background in more detail. We then summarise the parties' submissions and identify the issues arising from those submissions.

Canterbury Earthquake Recovery Act

[13] The Canterbury Earthquake Recovery Act was passed by Parliament under urgency in response to the February 2011 earthquake.[17] It sets a framework for earthquake response measures to be coordinated, with a particular emphasis on the roles of the Minister for Canterbury Earthquake Recovery (the Minister) and CERA and its chief executive.

[14] Part 1 of the Act, headed "Preliminary Provisions", contains a definition section and provides that the Act binds the Crown.[18] The purposes of the Act are set out as:[19]

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17 This Act, by s 89(1), repealed and replaced the Canterbury Earthquake Response and Recovery Act 2010 which had been passed after the September 2010 Canterbury earthquake.

18 Canterbury Earthquake Recovery Act, s 5.

19 Section 3.

(a) to provide appropriate measures to ensure that greater Christchurch and the councils and their communities respond to, and recover from, the impacts of the Canterbury earthquakes:

(b) to enable community participation in the planning of the recovery of affected communities without impeding a focused, timely, and expedited recovery:

(c) to provide for the Minister and CERA to ensure that recovery:

(d) to enable a focused, timely, and expedited recovery:

(e) to enable information to be gathered about any land, structure, or infrastructure affected by the Canterbury earthquakes:

(f) to facilitate, co-ordinate, and direct the planning, rebuilding, and recovery of affected communities, including the repair and rebuilding of land, infrastructure, and other property:

(g) to restore the social, economic, cultural, and environmental well-being of greater Christchurch communities:

(h) to provide adequate statutory power for the purposes stated in paragraphs (a) to (g):

(i) to repeal and replace the Canterbury Earthquake Response and Recovery Act 2010.

[15] Part 2, headed "Functions and powers to assist recovery and rebuilding", is divided into a number of subparts. Subpart 1 provides for input into decision-making by the community. It provides that the Minister must arrange for a community forum that meets at least six times a year, and that at least 20 suitably qualified persons must be invited to participate.[20] The Minister and the chief executive of CERA must have regard to information or advice provided by the forum.[21] In addition, the Minister must arrange a cross-party parliamentary forum from time to time and invite the attendance of members of Parliament who reside in greater Christchurch or represent constituencies in the greater Christchurch area.[22]

[16] Subpart 2 sets out the functions of the Minister and the chief executive. Among other powers, the Minister is given the power to suspend, amend or revoke the whole or parts of Resource Management Act 1991 (RMA) documents, resource

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20 Section 6(1)–(3).

21 Section 6(4).

22 Section 7. "[G]reater Christchurch" is defined in s 4 as "the districts of the Christchurch City Council, the Selwyn District Council, and the Waimakriri District Council, and includes the coastal marine area adjacent to these districts".

consents and other instruments applying in greater Christchurch.[23] The Minister may also give directions to councils and council organisations,[24] compulsorily acquire land (in accordance with subpt 4), and determine the compensation payable for such acquisitions and for the demolition of buildings (in accordance with subpt 5).[25]

[17] The Minister must appoint a Canterbury Earthquake Recovery Review Panel of four suitable persons to provide advice in relation to delegated legislation made under the Act.[26] The Minister must also provide quarterly reports and an annual review to Parliament concerning the exercise of powers under, and the operation and effectiveness of, the Act.[27] The Minister is also tasked with recommending for approval a Recovery Strategy for greater Christchurch, as well as reviewing and approving any changes to that Strategy.[28] The Minister must also direct the development of Recovery Plans, direct the matters to be covered by the Recovery Plans, and approve and review any changes of Recovery Plans for all or part of greater Christchurch.[29]

[18] The chief executive is responsible for commissioning and disseminating information, controlling building, demolition and removal work, closing and restricting access to roads and acquiring and disposing of land and property, amongst other matters.[30] In addition, the chief executive must develop a Recovery Strategy for submission to the Minister and develop a Recovery Plan if directed to do so by the Minister.[31]

[19] Section 10 makes it clear that any powers, rights and privileges under the Act must be exercised in accordance with the purposes of the Act and are only to be used when it is reasonably considered necessary to do so. Section 10 states:

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23 Section 8(f).
24 Section 8(g)–(h).
25 Section 8(j)–(k).
26 Sections 8(l), 72, 73, 74, 75 and 76.
27 Sections 8(m), 88 and 92.
28 Section 8(b)–(c).
29 Section 8(d)–(e).
30 Section 9.
31 Section 9(a) and (c).

> **10 Powers to be exercised for purposes of this Act**
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> (1) The Minister and the chief executive must ensure that when they each exercise or claim their powers, rights, and privileges under this Act they do so in accordance with the purposes of the Act.
>
> (2) The Minister and the chief executive may each exercise or claim a power, right, or privilege under this Act where he or she reasonably considers it necessary.
>
> …

[20] Subpart 3 is headed "Development and implementation of planning instruments". Section 11 provides that the chief executive is to develop a draft Recovery Strategy for consideration by the Minister. The Governor-General by Order in Council, on the recommendation of the Minister, may approve the strategy. The aim and content of the Recovery Strategy is described in s 11(3):

> (3) The Recovery Strategy is an overarching, long-term strategy for the reconstruction, rebuilding, and recovery of greater Christchurch, and may (without limitation) include provisions to address—
>
> (a) the areas where rebuilding or other redevelopment may or may not occur, and the possible sequencing of rebuilding or other redevelopment:
>
> (b) the location of existing and future infrastructure and the possible sequencing of repairs, rebuilding, and reconstruction:
>
> (c) the nature of the Recovery Plans that may need to be developed and the relationship between the plans:
>
> (d) any additional matters to be addressed in particular Recovery Plans, including who should lead the development of the plans.

[21] The Recovery Strategy is required to be developed in consultation with Christchurch City Council, Environment Canterbury, Selwyn District Council, Waimakariri District Council, Te Rūnanga o Ngāi Tahu, and any other persons or organisations that the Minister considers appropriate;[32] and the Act requires a draft to be prepared within nine months of the Act coming into force.[33] The development process has to include one or more public hearings.[34] The draft is to be publicly

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32 Section 11(4).
33 Section 12(2).
34 Section 12(1).

notified and members of the public given the opportunity to make written comments on the document.[35]

[22] The effect of a Recovery Strategy, as provided in s 15, is that:

> (1) No RMA document or instrument referred to in section 26(2), including any amendment to the document or instrument, that applies to any area within greater Christchurch may be interpreted or applied in a way that is inconsistent with a Recovery Strategy.
>
> (2) On and from the commencement of the approval of a Recovery Strategy, the Recovery Strategy—
>
> > (a) is to be read together with and forms part of the document or instrument; and
> >
> > (b) prevails where there is any inconsistency between it and the document or instrument.
>
> (3) No provision of the Recovery Strategy, as incorporated in an RMA document under subsection (2)(a), may be reviewed, changed, or varied under Schedule 1 of the Resource Management Act 1991.

[23] Sections 16 to 26 govern Recovery Plans. Section 16 provides that the Minister may direct responsible entities to develop a Recovery Plan for all or part of greater Christchurch.[36] Section 16 provides:

> **16 Recovery Plans generally**
>
> (1) The Minister may direct 1 or more responsible entities to develop a Recovery Plan for all or part of greater Christchurch for his or her approval.
>
> (2) The direction must specify the matters to be dealt with by the Recovery Plan, which matters may include provision, on a site-specific or wider geographic basis within greater Christchurch, for—
>
> > (a) any social, economic, cultural, or environmental matter:
> >
> > (b) any particular infrastructure, work, or activity.
>
> (3) A responsible entity may request that the Minister direct it to develop a Recovery Plan.

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35 Section 13.

36 Canterbury Earthquake Recovery Act, s 16(1). The only compulsory Recovery Plan is for the CBD: see s 17(1). The CBD is defined under s 4 as the area bounded by four specified avenues. A "responsible entity" is defined in s 4 as meaning "the chief executive, a council, a council organisation, a department of the Public Service, an instrument of the Crown, a Crown entity, a requiring authority, or a network utility operator".

(4) Where the Minister directs the development of a Recovery Plan, he or she must ensure that the direction is notified in the *Gazette* together with a list of all other Recovery Plans being developed or in force.

[24] A Recovery Plan must be consistent with the Recovery Strategy, but may be developed and approved before a Recovery Strategy is approved.[37] If a Recovery Plan is developed before the Recovery Strategy is approved, the Minister must direct that the Plan be reviewed and amended to ensure it is consistent with the Recovery Strategy.[38]

[25] Neither the Minister nor any responsible entity has a duty to consult with regard to Recovery Plans, except in accordance with s 20(2) and (3), which provides for public notification of any Recovery Plan and the ability of members of the public to make written submissions.[39] The Minister otherwise may determine how Recovery Plans are to be developed and the extent of any consultation or public hearings,[40] taking into account, under s 19(2), the following:

(a) the nature and scope of the Recovery Plan; and
(b) the needs of people affected by it; and
(c) the possible funding implications and the sources of funding; and
(d) the New Zealand Disability Strategy; and
(e) the need to act expeditiously; and
(f) the need to ensure that the Recovery Plan is consistent with other Recovery Plans.

[26] Once a Recovery Plan has been developed and approved by the Minister following consultation and any public meetings, the plan is binding. Section 23 provides that a Recovery Plan restricts the exercise of functions and powers under the RMA in that a variety of decisions, or recommendations, may not be made if inconsistent with the plan. Section 27 enables the Minister to, by public notice, suspend, amend or revoke a range of controls within the greater Christchurch area, including resource management, local government, land transport and conservation controls.

[27] Subpart 4, among other things, governs information gathering and

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37 Section 18(1) and (2).
38 Section 18(3).
39 There are special added consultation requirements for the CBD Plan: see ss 17 and 20(1).
40 Section 19(1).

dissemination, the control of building works and the power to acquire and dispose of property. Section 53 empowers the chief executive to purchase land and personal property in the name of the Crown. Section 54 empowers the Minister to acquire land compulsorily in the name of the Crown, subject to the payment of compensation under subpt 5.

[28] Subpart 5 provides for compensation where land is compulsorily acquired under the Act, or where a non-dangerous building is required to be demolished.[41] Section 67(1) provides that:

> **67 No compensation except as provided by this Act**
>
> (1) Nothing in this Act, apart from this subpart or section 40 or 41, confers any right to compensation or is to be relied on in any proceedings as a basis for any claim to compensation.

[29] Subpart 6 specifies appeal rights against a decision of the Minister or the chief executive. Subpart 7 provides for delegated legislation and outlines the functions of the Canterbury Earthquake Recovery Review Panel. Subpart 8 contains miscellaneous provisions such as those concerning compliance orders.

Legislative history

[30] The Canterbury Earthquake Recovery Bill was introduced on 12 April 2011 and completed its third reading on 14 April 2011. The Bill was introduced, and moved through the House, under urgency.[42]

[31] When introducing the Bill, the Minister for Canterbury Earthquake Recovery, the Hon Gerry Brownlee, described the powers vested in the Minister and the chief executive as "necessary to enable an effective, timely, and coordinated recovery for greater Christchurch".[43] According to the Minister, the Bill "provides appropriate

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41 Section 60. Section 41 also provides for compensation for damage to other property caused by a negligent demolition.

42 See (12 April 2011) 671 NZPD 17898. Given this urgency, the Bill was not referred to a select committee for examination. Instead, the Local Government and Environment Committee was instructed to hear evidence only and was not empowered to recommend amendments to the Bill: see Local Government and Environment Committee *Hearing of evidence on the Canterbury Earthquake Recovery Bill* (14 April 2011) at 3.

43 (12 April 2011) 671 NZPD 17899.

measures to enable Governments to facilitate and, if necessary, direct greater Christchurch and its communities to respond to, and recover from, the impacts of the two Canterbury earthquakes". The Minister emphasised that the timely decisions required would not be possible under the current legislation, whereas the processes set out in the Bill are "efficient while providing appropriate safeguards".[44] Concluding his introductory speech, the Minister highlighted the purpose of the legislation and reassured the House that the powers would not go unchecked. The Minister said:[45]

> Overall, this bill enables the Government to move swiftly to restore the social and economic wellbeing of the greater Christchurch area and its affected communities. The checks and balances ensure that the necessary powers for recovery are used judiciously, are open to appropriate levels of public scrutiny, and provide for appeal.

[32] In essence, the purpose of the Bill was to put in place mechanisms for the effective recovery of the Christchurch region. As the Minister said:[46]

> In order to achieve the policy intent of effective and efficient rebuild and recovery in Christchurch, the legislation needs to ensure that the desired outcomes identified in the recovery strategy by the Christchurch Earthquake Recovery Agency [sic] and the Minister, which provides for the recovery plans, are able to be efficiently and effectively delivered on the ground.

[33] Much of the concern surrounding the Bill was due to the extensive powers to be vested in the Crown. In response to criticism that the powers granted under the Bill "go too far", the Hon Kate Wilkinson, the then Minister for Conservation, said that that those fears had not been realised with the predecessor legislation (the Canterbury Earthquake Response and Recovery Act 2010) and that "[t]here are significant checks and balances to ensure that the powers are used properly, and are necessary for the Canterbury recovery and rebuild".[47] Mr Brownlee, during the Bill's second reading, stated that the "most clear check and balance is the requirement that all of those powers must be exercised in the recovery process and

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44 (12 April 2011) 671 NZPD 17899. See also the Minister's comments at 18130 where he said "[t]his bill is an enabling framework setting out a range of powers that may need to be exercised during the recovery process. It does have significant checks and balances on the use of those powers."

45 At 17901.

46 At 17899.

47 At 17904.

cannot step outside of that".[48]

[34] During the Bill's second reading, Mr Brownlee also made the following comments about Recovery Plans. He said that:[49]

> The decisions that need to be made here are very, very dependent upon research about the condition of the land in Christchurch, and upon getting enough information to deal with individuals who have those broken properties so that they can be given some choices about what their future is.
>
> ... All of those things will require a series of recovery plans, and, quite patently obviously, there will need to be discussion about how those plans are delivered with those local communities and those affected individuals.

[35] The need for community participation and consultation in the decision making processes, to the extent compatible with expedited recovery measures, was stressed. Ms Wilkinson, in recognising the need for efficiency and community input, said:[50]

> It is important that the need for community participation is balanced against the need for timely and effective decision-making. Cantabrians want a say in how their region is rebuilt. It is, after all, their region. This bill provides for the establishment of a community forum, made up of local representatives who will provide advice to the Minister. There will also be a public consultation process in place. Cantabrians want to be heard, but they want to see action. It is a matter of striking the balance between effective coordination and consultation and the need for progress.

[36] A similar comment was made by Mr Brownlee when, during the second reading, he said "I sincerely think that having a structure that allows rapid decision-making that can give effect to decisions that the community is on board with is exactly what is required here".[51]

[37] Mr Brownlee also emphasised the importance of the quarterly reports to Parliament required by the Bill.[52] He described the reporting requirement as a "significant control".[53]

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48 At 18130.
49 At 18130.
50 At 17904.
51 At 18129.
52 See above at [17].
53 (12 April 2011) 671 NZPD 17901.

[38] In essence, while the Act granted extensive powers to the Crown to ensure the physical, social, economic, cultural and environmental recovery of greater Christchurch, the legislative history illustrates that the Crown was not to be granted unbridled power. Instead, the legislation provided for extensive checks and balances and ensured that community input was central, but not decisive, to decisions that would have significant implications for the communities of greater Christchurch. As the legislative history makes clear, the Recovery Strategy and the Recovery Plans were to be the central mechanism for Canterbury's recovery.

Further background

[39] As noted above, the first of the series of Canterbury earthquakes occurred on 4 September 2010. Further major earthquakes occurred on 22 February 2011 and 13 June 2011. These and related earthquakes and aftershocks caused some areas of the city to experience liquefaction and land damage. In addition, some Christchurch properties, especially in the Port Hills area, were in danger from rock fall, cliff collapse and land slippage.

[40] The Government responded to the first earthquake by appointing Mr Brownlee as the Minister for Canterbury Earthquake Recovery on 7 September 2010. The Canterbury Earthquake Response and Recovery Act 2010 was introduced on 14 September 2010 and came into force on 15 September 2010.

[41] Following the February 2011 earthquake, the 2010 Act was replaced by the Canterbury Earthquake Recovery Act 2011 on 18 April 2011. CERA had been established as a new Government Department on 29 March 2011.[54] The first chief executive of CERA was appointed on 13 June 2011.[55]

CERA work

[42] From April 2011, officials from EQC, CERA and the Treasury began assessing the impact of land and property damage in the greater Christchurch area and identifying the worst affected areas. In identifying the land damage, extensive

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[54] State Sector (Canterbury Earthquake Recovery Authority) Order 2011. See also sch 1 of the State Sector Act 1988 as amended with effect from 29 March 2011.

[55] This first chief executive resigned from his role as chief executive on 17 November 2014.

data was collected from sources such as Land Information New Zealand, land data from local councils, engineering teams, private surveyors and other engineering resources. Property data was collected from EQC and private insurers. On behalf of the EQC, Tonkin & Taylor (a firm of environmental and engineering consultants) was commissioned to assess the land damage caused by the 2010 and 2011 earthquakes.

[43] It was recognised that some areas may no longer be suitable for habitation. In discussing land "retirement", an internal CERA paper prepared at the beginning of June 2011 identified options, which, the paper stated, were not "all mutually exclusive and so a combination may be appropriate". The options were:

(a) Voluntary or compulsory acquisition of property (under s 53 of the Canterbury Earthquake Recovery Act);[56]

(b) Using the power under s 27 of the Act to amend the land use zoning under the City Plan;[57]

(c) Using s 27 to remove existing use rights related to the land;[58]

(d) The Minister could direct under s 16 that a Recovery Plan be produced setting out the amendments required to the City plan and any other relevant RMA document; and[59]

(e) The Christchurch City Council amending the City Plan to change their land zoning.[60]

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56 The paper identified that the "pros" of this option were that it could "happen without the need for any further approvals and/or consultation" and that "[l]and use activities easily managed if in Crown ownership". The "cons" were identified as "[l]ess community awareness and/or input into the process" and "[l]ess linkage to overall recovery strategy".

57 The "pros" were identified as being "[c]an affect change immediately following a public notice", while the "cons" were the same as identified above in n 56.

58 The "pros" were identified as being "[c]an affect change immediately following a public notice" and the "cons" as "[r]emoves existing use rights without any input from those directly affected", "[l]ess community awareness and/or input into the process" and "[l]ess linkage to overall recovery strategy".

59 The "pros" were identified as "[ensuring] a more formal, transparent process with an opportunity for community engagement" and "[g]reater linkage to overall recovery strategy, including input into future land use options". The "cons" were identified as being "[l]onger timeframes to complete process" and "[c]ommunity expectation that their views may change decisions".

[44] In his evidence, the then CERA chief executive said that, "although [compulsory acquisition] was an option raised by CERA officials, by the time I took up my appointment as Chief Executive on 13 June [this option] was not on the table".

Cabinet committee's decisions

[45] As noted above, a week after the June 2011 earthquake, Cabinet authorised a group of eight senior Ministers to take decisions on matters relating to land damage and remediation issues. On 22 June 2011, these Ministers made a number of decisions which were recorded in a memorandum for Cabinet signed by Mr Brownlee dated 24 June 2011 (the Brownlee paper). The decisions were announced to the public by the Prime Minister and Mr Brownlee on 23 June 2011.

[46] In his paper, Mr Brownlee said that he considered the loss of confidence and the scale and severity of the damage warranted "a central government response".[61] A "circuit-breaker" was required "to arrest the current decline in confidence and to form a solid basis for recovery".[62]

[47] The Committee's decisions were taken in light of a prediction from GNS[63] that the chance of an earthquake of a magnitude of between 6 and 6.9 in the region over the coming year was 34 per cent, falling to 17 per cent if there were no significant aftershocks or triggering events in the following month.[64]

[48] The Brownlee paper explained that the Committee was of the view that "urgent decisions and announcements" from the Government were needed as to how recovery would be supported in the worst affected suburbs. The paper also emphasised the importance of providing certainty to home owners, creating

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60 The "pros" were identified as the fact it could "occur without using [Canterbury Earthquake Recovery] Act powers" and "[l]ink to other related plan changes required". The "cons" were identified as "[d]oes not deal with the issues of existing use rights" and "[l]onger timeframes to complete process".

61 Memorandum for Cabinet "Land Damage from the Canterbury Earthquakes" (24 June 2011) [Brownlee paper] at [19].

62 At [19].

63 Formerly known as the Institute of Geological and Nuclear Sciences, GNS is a New Zealand Crown Research Institute which provides earth, geosciences and isotope research and consultancy services.

64 Brownlee paper, above n 61, at [16].

confidence to enable people to move forward with their lives, and providing confidence in decision-making processes for home owners, business owners, insurers and investors.[65] The Committee considered that it should use the best available information to inform decisions and have "a simple process in order to provide clarity and support for land-owners, residents, and businesses in [the worst-affected] areas".[66]

[49] As noted above, the Committee identified four zones in Christchurch "based on the severity and extent of land damage, the cost-effectiveness and social impacts of land remediation".[67] The zones were labelled green, orange, red and white.[68]

[50] The green zones covered areas where there were "no significant issues which prevent rebuilding in those areas, based on current knowledge of seismic activity".[69] The red zones were reserved for areas where "rebuilding may not occur in the short-to-medium term because the land is damaged beyond practical and timely repair".[70] It was noted that most buildings in the red zones were rebuilds, that the areas were at risk of further danger from low-level shaking, floods or spring tides and that infrastructure needed to be rebuilt.[71]

[51] The orange zones were areas where further work was required to determine if rebuilding could occur in the short-to-medium term.[72] The white zones included the Port Hills area where the 13 June 2011 earthquake had caused further extensive damage necessitating further assessment.[73]

[52] The Brownlee paper outlined the criteria used by the Committee for determining those areas where rebuilding was unlikely to be practical over the short-to-medium term as follows:[74]

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65 At [5] and [2.7] of the recommendations.
66 At [5].
67 At [10].
68 The decisions taken by the Committee did not deal with the Central Business District as that was to be addressed as part of the "Central City Plan": see at [2.2] of the recommendations.
69 At [10](a).
70 At [10](c).
71 At [10](c).
72 At [10](b).
73 At [10](d).
74 At [36] (emphasis in the original).

(a) There is **area-wide land** damage, thereby implying some sort of area-wide solution; AND

(b) An engineering solution to remediate the land damage would:

- **be uncertain** in terms of the detailed design, its success and its possible commencement, given the ongoing seismic activity, AND
- **be disruptive** for landowners, as the commencement date is uncertain (both in terms of confidence in the land settling sufficiently to begin remediation and the need to sequence the many areas where remediation would be required), and the length of time they would need to be out of their homes to allow remediation to occur and new homes built, AND
- **not be timely**: for example there is also substantial replacement of infrastructure required and/or the land level needs to be significantly lifted effectively requiring work equivalent to the development of a new subdivision, and would probably lead to significant social dislocation for those communities in the short-to-medium term, AND
- **not be cost-effective**: on a per section basis the cost of remediation is greater than the value of the land as shown below:

The EQC contribution to the land remediation + *The betterment cost (i.e. perimeter treatment and/or additional raising of the land)* + *Infrastructure removal and replacement costs*	
If the cost of the above exceeds the value of the relevant land the area is reclassified as a Red Zone	*If the cost of the above is less than the value of the relevant land then the area is reclassified as a Green Zone, but may require some land repair work*

(c) The **health or well-being of residents** is at risk from remaining in the area for prolonged periods.

[53] The Brownlee paper went on to say that, "[i]f these criteria are met, then the government should consider how it can best support the recovery in these areas".[75] It was recognised that, in some areas of significant land damage, there may be

[75] At [37].

isolated pockets of land that fared reasonably well.[76] However, it was considered that, "without a full area-wide land remediation solution, the largely undamaged properties may be at risk from the works involved" in the land remediation for neighbouring properties.[77]

[54] In addition, it was considered that the social impacts of widespread remediation options had to be considered. It was estimated that large-scale remediation programmes were likely to take from three to five years (if not longer).[78] This would require all of the residents of the affected areas to be relocated while remediation took place. It was also uncertain whether private insurers would offer insurance to properties on land that required such a high level of remediation.[79] These considerations added further weight to any decision not to commit to remediation where it appeared not to be cost-effective.[80]

[55] The Brownlee paper recorded that the "the government could allow the various insurance schemes and policies in place in the Red Zones to play out without any intervention".[81] However, it was considered that this could result "in protracted individual settlements for the affected occupants given the great uncertainty regarding when, or if, or on what terms, repairs or rebuilds could take place in these areas given the ongoing uncertainty of and risk management with respect to the underlying geotechnical state of the land".[82]

[56] However, that approach was not adopted as the paper stated it would not meet the objectives of certainty, confidence for landowners or a simplified process.[83] Therefore the making of offers to purchase insured residential properties on the terms set out above at [4] was recommended. It was noted that these offers would ensure that insured residential landowners' equity in their homes would be preserved.[84]

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76 At [38].
77 At [38].
78 At [39] and [40].
79 At [39].
80 At [40].
81 At [50].
82 At [50].
83 At [50].
84 At [58].

[57] The paper recorded the financial implications of these purchase decisions. The gross cost of purchases of insured properties in the red zones would be up to $1.7 billion, although insurance recoveries would mean that the net costs would be between $485 and $635 million.[85] It was proposed that the properties purchased be expensed immediately as they "currently have a minimal value".[86]

[58] The paper made the following comments about the implications of the purchase offers on infrastructure and services in the red zones:[87]

> As a result of these offers there is unlikely to be any justification in the near to medium term for the infrastructure and services in these areas to receive any more than temporary repairs. The relevant Councils will be asked to discuss any proposed maintenance and repair plans, for the infrastructure in these areas, or any proposed regulatory interventions for the areas.

[59] As to uninsured residential properties and vacant lots, the paper said that "consideration will need to be given over time to the position of these people".[88] It said:[89]

> Neither uninsured residential properties nor vacant lots are covered by EQC land or improvements insurance. For residential owners, the risks of not having insurance were risks that ought to have been considered when making the decision to invest in the property. Residential owners should have been aware of the risks when choosing not to purchase insurance. Vacant lot owners were not eligible for EQC or private insurance cover.

Purchase offers

[60] In due course those insured property owners within the red zone, who returned a consent form (allowing the government to share information with EQC and the owner's private insurers to develop the offers) to CERA, received an offer to purchase from the then chief executive. The owners of such properties had the two choices that are set out above at [4]. The offer documents provided that, under Option 1 (selling the land and assigning EQC and private insurer claims to the

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85 At [87]. There was no indication how these figures was calculated by the Treasury. As the Crown submitted, the figures show that insurance recoveries were anticipated to exceed 50 per cent of the gross cost of purchase. However, it was still anticipated that insurance recoveries would not cover the whole of the purchase cost and that there would be a net cost, at least of $485 million.

86 At [89].

87 At [52].

88 At [63].

89 At [62].

Crown), the purchase price paid by the Crown would be adjusted if an insured property owner was underinsured by more than 20 per cent. The fact sheet accompanying the offers said:[90]

> If your property is underinsured by more than 20 per cent (for example, because it is insured for a fixed sum which is less than the rating valuation or its size is under-declared on the policy), the Crown's offer to pay the most recent rating valuation will be reduced by the percentage that you are underinsured.

[61] The supporting information to the purchase offered answered a number of generic questions, including:[91]

> **What will happen to my property if I decide that I do not want to accept the Crown's offer?**
>
> If you decide that you do not want to accept the Crown's offer, you should be aware that:
>
> - The Council may[92] not be installing new services in the residential red zone.
> - The Council and other utility providers may reach the view that it is no longer feasible or practical to continue to maintain services to the remaining properties.
> - Insurers may cancel or refuse to renew insurance policies for properties in the residential red zones.
> - While no decisions have been made on the ultimate future of the land in the residential red zones, CERA does have powers under the Canterbury Earthquake Recovery Act 2011 to require you to sell your property to CERA for its market value at that time. If a decision is made in the future to use these powers to acquire your property, the market value could be substantially lower than the amount that you would receive under the Crown's offer.

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90 We quote the current version of the document, which is: CERA "Purchase offer supporting information for Residential Red Zone" (March 2013) <www.cera.govt.nz>. An older version appears to have been quoted in both the High Court and Court of Appeal judgment: *Quake Outcasts* (HC), above n 6, at [30] and *Quake Outcasts* (CA), above n 6, at [31] but that version was not contained in the Case on Appeal to this Court.

91 Mr Brownlee and the then chief executive of CERA made similar remarks to these in media interviews.

92 The older version, quoted in the Court of Appeal and the High Court, used more unequivocal wording. It said that the "Council will not be installing new services". It went on to say: "If only a few people remain in a street and/or area, the Council and other utility providers may reach the view that it is no longer feasible or practical to continue to maintain services to the remaining properties." See *Quake Outcasts* (HC), above n 6, at [30]; *Quake Outcasts* (CA), above n 6, at [31].

Consultation

[62] In carrying out the zoning decisions and offers, the Crown did not engage in public consultation and did not consult with either the Community Forum or the cross-party parliamentary forum on this approach.[93] This lack of consultation was noted by the Report of the Finance and Expenditure Committee in their "2010/11 financial review of the Canterbury Earthquake Recovery Authority and the Earthquake Commission".[94] The Finance and Expenditure Committee's report stated:[95]

> Some of us are concerned that the decision to zone land into different categories was undertaken with insufficient consultation, was not based on clear criteria, and has proved divisive of communities.

[63] The report went on to say:[96]

> Some of us are concerned about a lack of engagement with the public over these zoning decisions, which affect the future of entire communities. In contrast with normal council processes, which would involve advertising and public submissions, information flows had been confusing and poorly managed.

Recovery Strategy

[64] After the June 2011 decisions, community workshops were organised by CERA seeking public comment on a Recovery Strategy for greater Christchurch. The draft Recovery Strategy was made available for public viewing, comment and consultation from 10 September 2011 to 31 October 2011. The completed Recovery

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93 The first community forum was not held until 7 July 2011 (after the red zone decisions). It appears that the first cross-party parliamentary forum was held on 3 May 2011 but that it seems to have been accepted by the Crown there was no consultation on these measures. Mr Brownlee's affidavit of 1 July 2013 at [41] acknowledged that "[t]here was no information or advice from the community forum which was relevant to the decisions Cabinet was making about the [residential red zone] in June 2011".

94 Finance and Expenditure Committee *2010/11 financial review of the Canterbury Earthquake Recovery Authority and the Earthquake Commission* (29 March 2012).

95 At 4.

96 At 5. As is recorded in the transcript of evidence in the appendix to the report, the Hon Lianne Dalziel put the lack of consultation to the then chief executive of CERA. She said "The reason I wanted to kind of clarify the legal status of the land decisions is that if the city council is doing a plan change or a zoning change they would advertise it publicly, people would be able to make submissions, and there would be true engagement. But this has just been announced at press conferences — bang, a community's gone". Ms Dalziel's overall point appears to have been that there had been effective compulsion in an allegedly voluntary process. The chief executive responded by saying "Well, all I can say is that at the moment people wanted us to make them an offer, because a lot of people wanted to go": at 38.

Strategy came into effect on 1 June 2012.[97]

[65] The completed Recovery Strategy expressly acknowledged that, while it was envisaged when the Canterbury Earthquake Recovery Act was passed that the Recovery Strategy might have addressed the areas where rebuilding or other redevelopment may or may not occur, the Strategy had not been able to address that issue.[98] The reason for this given in the Recovery Strategy was because: [99]

> It is ... a huge and complex task to make decisions about land zoning and the location and timing of rebuilding. Similarly, it is not yet clear whether Recovery Plans – which are statutory documents with the power to overwrite a range of planning instruments – will be the most appropriate and effective way to provide direction.

[66] While the draft Recovery Strategy that was released on 10 September 2011 had made no mention of the future use of the red zone, the finalised Recovery Strategy stated the following:[100]

> **Residential red zone land clearance** is overseeing the clearance of residential red zone properties and the return of the land to open space. It consists of three stages over two to three years. The first stage is to remove built structures and services. The second will involve larger-scale land clearance and grassing. The final stage will be to liaise with utility providers to remove public infrastructure no longer needed. After that, Land Information New Zealand will manage the open space.

[67] To help achieve the outcomes of the Recovery Strategy, a Land Use Recovery Plan was directed to be created by the Minister to provide "direction for residential and business land use development to support recovery and rebuilding across" greater Christchurch.[101] The draft Land Use Recovery Plan, which was publically notified on 6 July 2013, stated:[102]

> In existing urban areas, the significant hazard has been addressed through establishing residential red and green zones and by the identification of

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97 The "Recovery Strategy for Greater Christchurch" was approved by the Governor-General by Order in Council (Canterbury Earthquake (Recovery Strategy Approval) Order 2012). The Order in Council was notified in the New Zealand Gazette: "Canterbury Earthquake (Recovery Strategy Approval) Order 2012" (31 May 2012) 61 *New Zealand Gazette* 1745.

98 CERA "Recovery Strategy for Greater Christchurch" (June 2012) [Christchurch Recovery Strategy] at 2.

99 At 2.

100 At 40.

101 Environment Canterbury Regional Council "Land Use Recovery Plan" (6 December 2013) at 6.

102 Environment Canterbury Regional Council "Draft Land Use Recovery Plan" (6 July 2013) at 62 (emphasis added).

> green zone land under three technical categories – TC1, TC2 and TC3. Until such time as the future use of this land is determined by the Crown *the only areas that are prohibited for urban activities are those within the residential red zone.*

[68] That paragraph was not included in the final Land Use Recovery Plan which was gazetted on 6 December 2013.[103]

Offers relating to other categories of property

[69] From around April 2012, CERA officials began working on the position of those not covered by the June 2011 decisions, including vacant land owners and uninsured house owners.

[70] On 15 June 2012, Mr Brownlee announced that the Crown had extended its offer to purchase red zone properties to include properties that had been under construction at the time of the February 2012 earthquake and to non-residential properties owned by not-for-profit organisations. The decision affected 17 residential properties that had been under construction and had building works insurance and seven non-residential properties owned by not-for-profit organisations that had insured their buildings, but, because of being non-residential, did not have EQC cover for their land.

[71] In announcing the decision Mr Brownlee said "[t]oday's announcement is consistent with the Crown's Recovery Principles and will enable these people to also get on with their lives".[104] In the Cabinet paper signed by Mr Brownlee on 25 May 2012, the rationale behind the extension of the offers was explained. For the residential properties under construction, the paper stated "the building/construction works could be insured but could not insure the land; Consistent with Crown's Recovery principles …". With regards to not-for-profits, it said "[p]roperty owners could not insure the land, could insure the building; Consistent with Crown's Recovery principles, supports not-for-profit organisations to re-establish elsewhere

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[103] Environment Canterbury Regional Council, above n 101. See "Land Use Recovery Plan Commencement Notice" (6 December 2013) 164 *New Zealand Gazette* 4517.

[104] CERA "Red zone offer extended to new categories" (15 June 2012) <www.cera.govt.nz>.

…".[105] As a result, owners of land that that had dwellings under construction and had building/construction insurance and owners of not-for-profits that had building insurance, were offered 100 per cent of the most recent valuation for their uninsured and uninsurable land.[106]

[72] On 30 August 2012, the Minister signed a revised Cabinet paper which related to four further categories of red zone owners. These were insured residential leasehold properties, properties with no insurance (vacant land and other uninsured properties) and insured commercial/industrial properties.[107] When the Minister announced the creation of the red zones and the associated offers in June 2011, it was said that the Government would be considering the position of the uninsured in the next few weeks and that it would get information to them as soon as possible.[108] It took 15 months to clarify the position of uninsured and vacant land owners. The reason for this delay was explained by Mr Brownlee in his affidavit where he said "CERA necessarily had to prioritise its work, so an assessment of the more difficult issues that affected fewer people had to wait".[109]

[73] Insured commercial and industrial properties (comprising 22 properties), received a 100 per cent offer in relation to improvements, but a 50 per cent offer in relation to land value.[110] This reflected the fact that the land did not have EQC insurance cover, as a consequence of not being residential land.[111] The same paper also dealt with insured residential leasehold properties occupied under perpetually renewable leases on land owned by the Waimakariri District Council. These owners did not receive the initial June 2011 Crown offer as they did not own their land. The

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105 Cabinet Paper "Red zone residential properties under construction and non-residential properties owned by not-for-profit organisations" (signed by the Minister on 25 May 2012) at 2.

106 With the same choice in relation to improvements as under the June 2011 offers.

107 See Cabinet Paper "Red Zone Purchase Offers for Residential Leasehold, Vacant, Uninsured, and Commercial/Industrial Properties" (signed by the Minister on 30 August 2012) [Cabinet Paper (30 August 2012)]. The recommendations were approved by the Cabinet Business Committee on 3 September: see Cabinet Business Committee (Minute of Decision), above n 5.

108 Gerry Brownlee "Latest Christchurch land information released" (23 June 2011) <www.beehive.govt.nz>.

109 Affidavit of Mr Gerry Brownlee (1 July 2013) at [49]. In its written submissions, Quake Outcasts submits that the delay was a deliberate tactic and designed to "increase the impact of the 'bleak environment' ... and thereby increase the uptake of the Crown's coercive offer": at [43]. We make no comment on this submission.

110 Cabinet Paper (30 August 2012), above n 107, at [12]–[17].

111 At [57]. See Earthquake Commission Act 1993, s 19 which only extends to residential land that has a residential building which is insured under the Act.

Crown offer effectively extended the June 2011 offers to these properties.[112]

[74] With regard to vacant land and uninsured residential properties the paper noted:[113]

> There are strong arguments for not extending an offer to these property categories on the same terms as for insured properties. It would compensate for uninsured damage, be unfair to other red zone property owners who have been paying insurance premiums, and it creates a moral hazard in that the incentives to insure in the future (where insurance is available) are potentially eroded.

[75] The paper, however, recognised the costs associated with owners of such properties electing to remain in the red zones, given the "limited scope to decommission infrastructure – which is costly to maintain".[114] The Christchurch City Council had estimated an ongoing infrastructure cost per household of over $16,000, compared to the pre-earthquake cost of about $600 per household.[115] This calculation assumed a 79 per cent occupancy rate but the cost would increase significantly as more people moved out of the zones.[116] The paper recorded that, as at 13 August 2012, out of 7,560 red zone properties 75 per cent of the owners of those properties had accepted Crown offers.[117]

[76] The paper recognised that uninsured owners in the red zone were in a different position to similar properties in the green zones:[118]

> Red zone properties are in areas of severe infrastructure damage, many surrounding neighbours have either left or are planning to leave (as evidenced by the high uptake rate of the Crown offer), and there is considerable uncertainty about what will happen to these areas in the future.

[77] The Minister did not support the option of no offer being made "as there are good reasons to support exit from the red zones".[119] The paper stated that, while any offer should recognise that red zone properties retained some residual value, it

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112 Cabinet Paper (30 August 2012), above n 107, at [23]–[29].
113 At [32].
114 At [33].
115 At [33]. We assume these figures represent the ongoing cost per year.
116 At [33].
117 See at [60]–[61]. Some of the remaining 25 per cent of properties were ineligible and/or had not yet received an offer.
118 At [34].
119 At [34].

should also reflect the fact that such properties were worth a lot less than the pre-earthquake value (estimates had been that the land was worth only 10 per cent of that value) and that the property damage in question was not insured against.[120]

[78] In relation to vacant land, the recommendation was to make 50 per cent offers.[121] This would ensure that the offers were not below post-earthquake values and "help support the signal that the Government wants to encourage property owners to move on from the red zone".[122] The estimated cost to the Crown of the purchase of the 65 sections in this category was $6.031 million with additional transaction costs of $1.098 million.[123]

[79] As to the uninsured residential properties (with improvements) in the red zones, it was recognised that these included properties "where the owner consciously chose to not insure, as well as those that may have been insured at some point but do not meet the insurance continuity requirements of the Crown offer for insured properties".[124]

[80] The offer to owners of uninsured residential properties was to be for 50 per cent of the land value only, with property owners retaining salvage rights to uninsured buildings and the possibility of relocation of buildings before settlement.[125] It was stated that:[126]

> This offer supports the signalling objective for the red zone while providing some support for recovering elsewhere and acknowledging that the owners were not fully insured throughout the whole process.

[81] The estimated cost for the purchase of the uninsured residential properties

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120 See [35.1] and [39].

121 In an April 2012 paper to the Minister, CERA had initially recommended extending the 100 per cent offer to owners of vacant land in the red zones. However, this recommendation appears to have been abandoned by July 2012.

122 Cabinet Paper (30 August 2012), above n 107, at [40].

123 At [42].

124 At [43]. The information accompanying the June 2011 offers specified that the Crown offer was not available to those that were not insured at the time of 22 February 2011 earthquake and those who were insured on 22 February 2011 but were not insured at the time of the offers: above n 90, at 8.

125 Cabinet Paper (30 August 2012), above n 107, at [44].

126 At [45].

was $4.162 million, with transaction costs of $1.266 million.[127] It was estimated that there were about 50 properties in this category.[128]

[82] On 3 September 2012, the Cabinet Business Committee agreed with and adopted the Minister's recommendations in relation to both uninsured residential properties and vacant land and the other categories discussed above.[129] The Cabinet Business Committee re-stated the objectives of the purchase offers, including certainty of outcome, creation of confidence to enable people to move forward with their lives, and creation of confidence for decision-making processes of insurers, home-owners, business owners and investors.[130]

[83] After that decision, a paper dated 7 September was circulated by CERA to the Minister of Finance (Hon Bill English), the Associate Minister of Finance (Hon Steven Joyce) and Mr Brownlee which recommended altering the land status of 37 properties in Port Hills area from white zones to red zones. Importantly, the paper stated that with respect to these areas, "CERA is acting on the principle that individual choice should be respected so long as life safety risks are adequately managed". A footnote to that statement provided that "[t]his differs from the flat land where there is clear benefit in clearing as much of the red zone areas as possible as these are large contiguous areas that could beneficially [be] managed as one large entity".[131]

[84] On 13 September 2012, Mr Brownlee announced the further red zone decisions and the offers to be made to each category of property owners. His press release detailed the offers to be made to each category of property owner. He commented that the offers were made "[i]n order to aid recovery and support the objectives of the residential red zone process".[132]

[85] To give effect to the September decisions, in November 2012, CERA

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127 At [49].

128 The figure was an estimate because officials could only become aware of these properties through self-identification or where insurance issues became apparent in the course of the Crown offer process for insured properties: see [47].

129 Cabinet Business Committee (Minute of Decision), above n 5.

130 At [1.2]. See above at [48].

131 This evidence was adduced before the hearing but after the filing of the Case on Appeal.

132 CERA "Further red zone properties addressed" (13 September 2012) <www.cera.govt.nz>.

published documents entitled *Purchase Offer Supporting Information for Uninsured Improved Properties in the Residential Red Zone* and *Purchase Offer Supporting Information for Vacant Land in the Residential Red Zone*, setting out the purchase offers that would be made once property owners had signed a consent form.[133] Owners would then have until 31 March 2013[134] to accept the Crown offer, with settlement of the transactions to occur by 30 April 2013.[135] The documents included the same advice as had been provided in the fact sheet given to the recipients of the 100 per cent offers relating to the infrastructure, insurance issues and the Crown's compulsory purchase powers.[136]

Current position of Quake Outcasts group

[86] Some of the members of Quake Outcasts continue to live in the red zone. Other members of Quake Outcasts have accepted the offer on a "without prejudice" basis so that they can take part in the current proceedings.[137]

[87] We note that the then chief executive of CERA, in his July 2013 affidavit, recognised that there are safety risks in the red zones and that there had been a large increase in fires, rodents, crime and looting in those areas.[138] In addition, there is evidence that New Zealand Post has begun withdrawing postal services to the red zone on the basis that residential occupation is no longer being sustained and the roads are no longer safe for its employees.

[88] We record at this point that a number of the Quake Outcasts group cannot be described as making a "conscious choice" not to insure their properties. The reasons for this include:

(a) a couple who had paid insurance premiums "religiously" but were in the process of having a financial adviser package up a complete

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133 CERA "Purchase offer supporting information for Uninsured Improved Properties in the Residential Red Zone" (November 2012) and CERA "Purchase offer supporting information for Vacant Land in the Residential Red Zone" (November 2012).

134 Or 31 May 2013 for Southshore properties.

135 Or 31 June 2013 for Southshore properties.

136 CERA, above n 133, at 5. See above at [61].

137 Others of the Quake Outcasts received, but did not accept, the 50 per cent offers, while some did not complete the necessary consent form and did not therefore receive any offer.

138 Affidavit of the chief executive of CERA (16 July 2013) at [14]–[15].

insurance offer for everything, with a four-day gap before the September 2010 earthquake;

(b) a couple who had overlooked changing insurance cover into their name because of stress from a cancer diagnosis and caring for dependent family members. This couple were uninsured at the time of the September 2010 earthquake and their insurance company had refused cover even though they had had insurance with the company since 1972;

(c) a claimant who had understood that insurance was in the hands of her bank; and

(d) a claimant who had not paid his insurance premiums for the two months prior to the earthquake by oversight.

Submissions

Quake Outcasts' submissions

[89] On behalf of Quake Outcasts, Mr Cooke QC submits that the Government's residential red zone measures had to be introduced under the machinery in the Canterbury Earthquake Recovery Act. This had just been enacted with provisions regulating such measures and it contains important protections necessary to justify the extraordinary steps involved in clearing the red zones.

[90] In his submission, any residual "third source" authority[139] that the Crown has could never authorise the kind of measures introduced in this case. Even assuming the existence of "third source" authority, this only provides authority for ancillary or

[139] We were referred to numerous articles that discussed the existence and scope of the "third source", including BV Harris "The 'Third Source' of Authority for Government Action" (1992) 108 LQR 626; BV Harris "The 'Third Source' of Authority for Government Action Revisited" (2007) 123 LQR 225; BV Harris "Government 'Third Source' Action and Common Law Constitutionalism (2010) 126 LQR 373; and J Simpson "The Third Source of Authority for Government Action Misconceived" (2012) 18 AULR 86. See also Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers Ltd, Wellington, 2014) at 652–658.

incidental administrative actions necessary for the day to day business of government. In Mr Cooke's submission, it is also clear that such authority does not arise where legislation "occupies the field" or when there is existing positive law. Further, it cannot authorise governmental action that affects rights and liberties. It is submitted that the Crown's actions in this case had significant practical effects which directly resulted in truncated rights.

[91] In this context, it is submitted that the unequal treatment of the uninsured (and the delays in making decisions about their position) is unlawful, an abuse of power and inconsistent with the earthquake recovery purposes of the Canterbury Earthquake Recovery Act. Even if the lack of insurance is a relevant point of differentiation for some of the Quake Outcasts group, the dramatic nature and effect of the different treatment is oppressive, disproportionate and unreasonable, especially as there has been no consideration of the individual circumstances of the affected persons. It is also contrary to the purpose of earthquake recovery, in terms of the Canterbury Earthquake Recovery Act.

[92] It is now more than three years since 100 per cent offers were made to the other insured residents and over a year since the High Court ordered that new offers consistent with the Act be made. Mr Cooke submits that, even if unequal treatment was a legitimate option open to the Government in June 2011, the exceptional circumstances now facing the Quake Outcasts group require that they now be treated equally with insured property owners. In his submission, any other relief has been, and would continue to be, ineffectual.

Fowler Developments' submissions

[93] Mr Rennie, for Fowler Developments, submits that there is no rational basis to discriminate between Fowler Developments and insured residential property owners. He says that Fowler Developments had uninsurable assets rather than uninsured assets and cannot rationally be penalised for having no insurance. He also points out that the offer of 100 per cent of 2007 rateable values was intended to be an area-wide or blanket solution to compensate for the effects of the red zoning decision and with the objectives of securing relocation of all within the red zones. This was

unachievable without a similar offer to vacant land owners.

[94] Mr Rennie points out that insured residential owners received the offer for 100 per cent of 2007 rateable value for their land regardless of whether the land was damaged, whether they had an EQC claim or whether such a claim would be of any value and notwithstanding that any land more than 8 metres from their dwelling was uninsured in any event.[140]

[95] In addition, Mr Rennie points out that the decision to create the red zones would have impacted on the value of the land. The earthquake damage had also seriously impacted the value of land. This meant that the offer to purchase the underlying land of insured residential owners for 100 per cent of rateable value cannot therefore have been based upon a post-earthquake market value. Instead, it was an offer of compensation for the consequential effects of the zoning decision which had rendered almost worthless the value of the residential properties.

[96] On the other issues, Fowler Developments adopts the Quake Outcasts' submissions.

Human Rights Commission's submissions

[97] The Human Rights Commission was granted leave to file submissions as an intervener. Its submissions focus on New Zealand's international obligations with respect to human rights.

[98] In terms of the red zoning decision, the Commission's argument is that the Canterbury Earthquake Recovery Act should be interpreted to "cover the field" in relation to decisions which impact on human rights, where the protections of the Act would enhance the protection and domestic justiciability of those rights. The Commission argues that the protective measures put in place by Parliament should not be side-stepped by executive action under the guise of "residual freedom" or the "third source".

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[140] Mr Rennie's reference to the 8 metre limit is from the Earthquake Commission Act which defines "residential land", among other things, as "all the land within 8 metres in a horizontal line of the building".

[99] In terms of the 50 per cent offers, the Commission argues that, in light of the purposes of the Act and New Zealand's international human right obligations, the reasons for a lower offer do not amount to a rational justification for differential treatment.

Crown's submissions

[100] Mr Goddard QC, on behalf of the Crown, submits that the June 2011 announcements merely provided information to the public about the condition of land in certain areas and identified those areas which were not suitable for rebuilding in the short-to-medium term. The announcements did not purport to alter the status of the land under the RMA and did not alter the uses to which the land could lawfully be put.

[101] It is submitted that the Crown does not require statutory authority to provide information to the public. Ministers were able to make the decision that this information should be provided and the Prime Minister and the Minister were able to provide the information, in the exercise of the Crown's common law powers. In Mr Goddard's submission, nothing in the Canterbury Earthquake Recovery Act limits or excludes the power to provide information.

[102] As to the decision to establish the red zones, it is submitted that this was a delegated Cabinet policy decision, implemented by the announcement made by the Prime Minister and the Minister for Canterbury Earthquake Recovery. It was not a decision made, or required to be made, under the Canterbury Earthquake Recovery Act. While it was accepted that in this case, the chief executive in June 2011 made the purchase offers to implement the Cabinet decisions under s 53 of that Act, it was nevertheless submitted that the Act does not limit the Crown's common law power to acquire land and personal property through voluntary transactions.

[103] Mr Goddard submits further that the distinction drawn between insured and uninsured property owners was based on differences in the value of the assets to be purchased and on fairness and precedent factors. In his submission, the Canterbury Earthquake Recovery Act does not prevent the chief executive taking into account,

when making an offer to purchase a property, the value of the assets to be acquired, the net cost to the Crown of that purchase, fairness as between different groups affected by the Canterbury earthquakes and, more generally, as between those affected by the earthquakes and persons affected by other natural disasters. The precedent effect of making a 100 per cent offer to these victims of a natural disaster, when no such offer has been made to others affected by the Canterbury earthquakes or to property owners affected by other natural disasters was also a relevant consideration.

[104] In addition, it is submitted that it was open to Ministers, when making funding decisions, to take these factors into account. The Canterbury Earthquake Recovery Act does not apply to ministerial decisions about expenditure of public money. The September 2012 Cabinet decisions made it possible for the chief executive to make an offer to the relevant group of property owners. Without the financial authority provided by the Cabinet decision, however, no offer could lawfully be made.

Issues

[105] The submissions raise the following issues:

(a) Was the Crown merely providing information in June 2011?

(b) Should the procedures under the Christchurch Earthquake Recovery Act have been used?

(c) What matters were relevant to the September 2012 decisions?

Was the Crown merely providing information in June 2011?

[106] We do not accept the Crown's submission that, in June 2011, the Government was merely providing information to the public. The Cabinet committee made a number of decisions on important matters (as identified in the Brownlee paper) including:

(a) the decision that the situation in Christchurch warranted a central government response;[141]

(b) the setting of objectives for the "urgent decisions and announcements" to be made by the Committee, including promoting confidence in decision-making processes for home and business owners, insurers and investors;[142]

(c) the setting of criteria for determining the identification of zones in Christchurch on the basis of land damage, and the cost-effectiveness and social impacts of land remediation;[143]

(d) the decision on detailed criteria for identifying areas where re-building was unlikely to be practical in the short-to-medium term and in particular, the decision that this was to include a cost/value analysis;[144]

(e) the decision as to the requirement for area-wide responses even if individual properties in the red zones had not suffered extensive damage;[145]

(f) the decision to require territorial authorities to discuss proposed maintenance or repair of infrastructure and services in the red zones with the Government (with a clear implication that any large scale maintenance and repairs would be discouraged);[146]

(g) the decision not to leave matters to individuals and their insurance companies;[147]

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141 See above at [46].
142 See above at [48].
143 See above at [49].
144 See above at [50]–[52].
145 See above at [53].
146 See above at [58].
147 See above at [55].

(h) the decision not to use the compulsory powers in the Canterbury Earthquake Recovery Act;[148] and

(i) the decision to offer to purchase insured residential properties at a sum in excess of their current value, with an estimated net cost of between $485 and $635 million.[149]

[107] We are not suggesting that the decisions that were taken by the Cabinet committee and announced publicly on 23 June 2011 were not sensible decisions. They may indeed, given the situation facing Christchurch, have been seen by the Committee as the only sensible decisions that could be made. This, however, does not rob them of their character as decisions.

[108] It is true that the decisions were made in light of what was considered to be the best available information.[150] The fact that decisions are based on information and that some or all of the information on which the decisions are based is communicated to the public at the same time as the decisions, does not mean that the decisions are subsumed in the information upon which they are based. Nor does it mean that communication of the decisions is merely communication of information.

Should the procedures under the Canterbury Earthquake Recovery Act have been used?

[109] In this section, we first consider whether the Canterbury Earthquake Recovery Act covers the field and therefore excludes the Crown acting under the so-called "third source" of power. If that question is answered in the affirmative, we consider what procedures under the Act should have been used (and in particular whether the red zoning decisions should have been made under the Recovery Strategy or a Recovery Plan). We then move to the question of whether s 53 should

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148 This was made explicit in the then chief executive of CERA's affidavit dated 16 July 2013 where he said "by the time I took up my appointment as Chief Executive on 13 June 2013 the option of compulsory acquisition was not on the table. ... I can confirm that this option had been discarded, and was and is not being pursued directly or indirectly." See above at [43]–[44]. However, we do note that the information accompanying the June 2011 offers referred to the Crown's possible use of the compulsory powers of acquisition: see above at [61].

149 See above at [57].

150 See above at [48]. This was a requirement that the Committee had set itself.

have been used to implement the purchase decisions, absent a Recovery Strategy or Recovery Plan. Finally, we deal with the Crown's argument that the Act has no role in funding decisions, before setting out our conclusions on whether the procedures under the Act should have been used.

Does the Act cover the field?

[110] The Crown argues that the red zoning decisions were not made under the Act and were not required to be made under the Act. Further, while the Crown accepts that the purchase offers were made under s 53 of the Act in this case, it submits that the common law ("third source") powers to acquire property (in cases of voluntary sale and purchase) still remained.

[111] The parties are agreed that, if the Act "covers the field", this leaves no room for the "third source" of power. As Lord Atkinson said in *Attorney-General v De Keyser's Royal Hotel Ltd*:[151]

> It is quite obvious that it would be useless and meaningless for the Legislature to impose restrictions and limitations upon, and to attach conditions to, the exercise by the Crown of the powers conferred by a statute, if the Crown were free at its pleasure to disregard these provisions, and by virtue of its prerogative to do the very thing the statutes empowered it to do. One cannot in the constructions of a statute attribute to the Legislature (in the absence of compelling words) an intention so absurd.

[112] For the reasons we explain below, we accept Quake Outcasts' submission that the Act covers the field and therefore that the procedures under the Act should have been used. This means that we do not need to make any comment on the existence or the extent of any residual Crown powers in other circumstances.[152]

[113] The first indication that the Act was intended to be the vehicle for earthquake

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[151] *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508 (HL) at 539. While that case concerned the interaction between the Royal prerogative and statute, the principle must apply to "third source" powers, if they exist.

[152] Professor Bruce Harris, in "Recent Judicial Recognition of the Third Source of Authority for Government Action" (2014) 26 NZULR 60 at 78, states that a statute may intend that the government continue to have the freedom to act under the third source in addition to the right to act under the statute. We do not need to comment on this suggestion either as we do not consider that the Christchurch Earthquake Recovery Act did leave the government the freedom to act under the third source (if it exists) if it was making significant decisions on earthquake recovery measures.

recovery measures is the title of the Act itself: the Canterbury Earthquake Recovery Act 2011. The next indication is in the purposes of the Act, which are set out in s 3.

[114] As noted at [14] above, the first purpose set out in the Act is to provide for appropriate measures to ensure a response to the impacts of the Canterbury earthquakes on greater Christchurch, its councils and Christchurch communities and to ensure the recovery from the effects of the earthquakes.[153] The second purpose is to enable community participation, without impeding a focussed, timely and expedited recovery,[154] which is the fourth purpose of the Act.[155] The other purposes include information gathering, facilitating and coordinating the recovery of affected communities and restoring the "social, economic, cultural and environmental well-being of greater Christchurch communities".[156] The role of the Minister and CERA is to ensure that recovery.[157] Providing "adequate statutory power for the purposes" set out above is also a purpose of the Act.[158]

[115] The purposes of the Act are, consistently with its title, focused on the recovery of the greater Christchurch communities from the earthquakes. They are expressed comprehensively, indicating that the Act was intended to be the vehicle (and the only vehicle) for major earthquake recovery measures.

[116] The argument that the Act "covers the field" in relation to significant earthquake recovery measures is reinforced by the fact that the powers and duties of the Minister and the chief executive, the people responsible for leading the recovery measures, are set out in detail. It is also reinforced by the requirement of the Act for the preparation of an overarching Recovery Strategy for the reconstruction, rebuilding and recovery of greater Christchurch.[159] It must have been envisaged that all major recovery strategies and measures were to be included in that Recovery Strategy.

[117] That the Act's role is exclusive is also shown by the safeguards in relation to

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153 Canterbury Earthquake Recovery Act, s 3(a).
154 Section 3(b).
155 Section 3(d).
156 Section 3(e)–(g).
157 Section 3(c).
158 Section 3(h).
159 Section 11.

the use of the powers in the Act, which are particularly important because many of the powers in the Act are highly coercive. It cannot have been intended that the safeguards in the Act could be circumvented by acting outside of the Act.

[118] As to the nature of these safeguards, the Act is explicit that all of the powers in the Act must be used for the purposes of the Act and, even then, only when it is reasonably considered necessary for those purposes.[160] There are also the consultation requirements through the community forum and the cross-party parliamentary forum,[161] as well as the specific consultation requirements related to the Recovery Strategy and Recovery Plans.[162] It is clear that participation from the affected communities, to the extent compatible with expedited recovery, is a key value of the Act.

[119] The Act also requires that the Minister produce quarterly reports on the operation of the Act and any powers exercised by, or on behalf of, the Minister or the chief executive under the Act.[163] In addition to these quarterly reports, the Act also requires annual reviews of the operation and effectiveness of the Act.[164] Again, it cannot have been envisaged that significant recovery measures would be implemented outside the Act and therefore free from these reporting requirements.

[120] The conclusion that the Act "covers the field" is reinforced by the legislative history. The legislative history, as outlined earlier in this judgment,[165] highlighted the recovery purpose of the Act. While the Act contains significant powers, these were to be used only for recovery purposes and the Ministers' speeches placed emphasis on the body of provisions designed to ensure that those powers are exercised judiciously, only to the extent necessary, with community input and that their use is reported on to Parliament.

[121] The measures decided upon by the Cabinet committee in June 2011 were significant earthquake recovery measures and should have been made under the

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160 Section 10.
161 Sections 6 and 7.
162 Sections 13 and 20.
163 Section 88.
164 Section 92.
165 At [30]–[38].

powers given for those purposes by the Act. That is what Parliament envisaged.

What procedures under the Act should have been used?

[122] Moving now to the question of which procedures in the Act should have been used, we note first that the Act provides that the Recovery Strategy may include provision to address the areas where rebuilding or other development may or may not occur and the possible sequencing of that work.[166] It may also include the location of existing and future infrastructure and the possible sequencing of repairs, rebuilding and reconstruction of that infrastructure.[167]

[123] The use of the word "may" in section 11 appears to have been used because, at the time of passing the Act, it was not conclusively known whether there would be areas where rebuilding was not appropriate. The word "may" cannot, however, be read as making it optional whether or not to include the designation of such areas in the Recovery Strategy if such designation took place in the context of significant earthquake recovery measures.

[124] After due consideration of available information, the Cabinet committee in June 2011 considered that some areas were inappropriate for rebuilding in the short-to-medium term and they were zoned red. Given the importance of these zoning decisions, the inevitable impact on infrastructure maintenance and development and their relevance to the recovery of the Christchurch region, this comes squarely within the type of decisions the Act contemplated would be made in the course of developing the Recovery Strategy.

[125] We do not accept the Crown submission that, because the red zone decisions were that rebuilding should not occur in the short-to-medium term, they do not come within the ambit of the Recovery Strategy, which is concerned with a long-term strategy. A long term strategy necessarily includes the steps to be taken in the short-to-medium term to achieve the long-term strategy. This is made clear by the reference to decisions on the sequencing of rebuilding and redevelopment and the repair and building of infrastructure. It may also be said to be implicit in the nine-

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166 Section 11(3)(a).
167 Section 11(3)(b).

month period for the development of the Strategy.[168]

[126] It was neither necessary nor feasible, given the Cabinet committee's objective of acting quickly to restore confidence, to wait for the promulgation of the Recovery Strategy. This situation was, however, anticipated by the Act, which provides that Recovery Plans may precede the Recovery Strategy.[169]

[127] This means that, before the Recovery Strategy was completed, significant matters (such as the area-wide zoning decisions made by the Cabinet committee in June 2011) that would ordinarily have been dealt with in the Recovery Strategy, should have been pursued through a Recovery Plan.

[128] In addition to the zoning decisions, there were also decisions about purchase offers to be made to insured residential property owners in the red zone. The purchase decisions were inextricably linked to the characterisation of the red zones as being unfit for land remediation and rebuilding in the short-to-medium term. In those circumstances, we consider that at least the broad outlines of those purchase decisions should have been dealt with in a Recovery Plan.[170]

[129] The details of any purchase offers covered in the Recovery Plan would then have fallen to the chief executive to be dealt with under s 53,[171] in accordance with the purposes of the Act, as required by s 10(1). We accept Quake Outcasts' submission that, once the June 2011 Cabinet decisions were made, realistically the chief executive's discretion was restricted to the mechanics of meeting the Cabinet decisions on purchase offers.

[130] The Court of Appeal considered that, because there was no intention to make alterations to the RMA regime in the June 2011 decision on the red zones, the use of the Recovery Plan processes would have been "awkward".[172] The Court of Appeal said that the situation would have been complicated because, under s 23 of the Act,

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168 Section 12(2).

169 Section 18(2).

170 As National MP, Nicky Wagner, said with regard to Recovery Plans, they are "the what, the where, and the how of the recovery": (12 April 2011) 671 NZPD 17911.

171 One of the functions of the chief executive under s 9 of the Act is "acquiring … land and property under section 53".

172 See *Quake Outcasts* (CA), above n 6, at [121] and [122].

any person exercising functions under the RMA is prohibited from making a decision or recommendation that is inconsistent with a Recovery Plan on a number of specified matters, including applications for resource consent.[173] As a result, the Court of Appeal concluded:

> [122] Accordingly, although we believe that the Recovery Plan mechanism could possibly have been adapted to provide a statutory mechanism for the June 2011 decision, we do not think that it is sufficiently aligned with what actually occurred in this case for us to be able to say that the intention of Parliament was that the Recovery Plan process was the mandatory mechanism for decisions of the type made in June 2011.

[131] We do not agree with the approach of the Court of Appeal. The prescribed legislative mechanisms are expressed in terms indicating that they are intended to be comprehensive. That the mechanisms under the Act may not be entirely suitable, convenient or perfectly "aligned" with what the Executive desires to achieve is not a reason for statutory procedures to be bypassed. It is for Parliament to amend the legislation if it is not fit for purpose. In addition, it cannot be inferred that Parliament would have anticipated, and sanctioned in advance, departure from the mandated procedures. That it would not is clear from the structure of the Act which provided powers that were flexible and could be sufficiently tailored to deal with any circumstances that arose. As is recognised in the Act, and was emphasised in the Parliamentary debates, significant decisions regarding Christchurch's recovery were also to have statutory safeguards and involve community participation.

[132] In any event, we do not agree with the Court of Appeal that the use of a Recovery Plan would have been "awkward" because of s 23 of the Act. Given that the Cabinet committee's decision did not purport to affect the RMA, it is difficult to see why s 23 would have been engaged. As s 16 of the Act recognises, Recovery Plans can be used for a range of matters, including any social, economic, cultural or environmental matters.[174] They are not limited to RMA issues and indeed the RMA is not even mentioned in s 16.

[133] In the High Court, Panckhurst J was of the view that the Minister was

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173 At [121].

174 Canterbury Earthquake Recovery Act, s 16(2)(a).

"obliged to invoke section 27 in order to define and create the red zone".[175] We do not agree. Section 27 deals with suspension, amending and revoking RMA plans and other documents. The Crown did not, by its June 2011 decision, purport to alter planning documents. The Act recognises that the Crown should not use coercive powers like s 27 if the same outcome can be achieved by less coercive means under the Act. This is the approach mandated by s 10 which only allows powers to be used when necessary.

[134] Nevertheless, we accept Quake Outcasts' submission that the red zoning decisions made in June 2011, despite not using the compulsory powers available under the Canterbury Earthquake Recovery Act and despite not affecting property rights,[176] were designed to facilitate and encourage movement out of the red zones.

[135] While the Crown argues that clearing the red zones has never been its intention, the aim of encouraging movement out of those zones is a necessary inference from the purchase offers that were made at 2007 values (despite the land damage) and the "fact sheet" accompanying the offers which highlighted, among other things, that services were likely to be discontinued and that the Crown retained the right to purchase properties compulsorily.[177]

[136] Such an intention was also made clear in the *Draft Land Use Recovery Plan* where it stated that "the only areas that are prohibited for urban activities are those within the residential red zone".[178] At the hearing in this Court, counsel for Quake Outcasts, Mr Cooke, recognised that the reference to urban activities being prohibited in the red zones was a mistake. Notwithstanding this, the sentence in the draft plan in our view is indicative of the Crown's thinking at the time: that voluntary withdrawal from the red zones was to be encouraged, reflected in the internal CERA paper that recognised that there is a "clear benefit in clearing as much of the red zone

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175 *Quake Outcasts* (HC), above n 6, at [70].

176 At least not affecting property rights in the narrow sense of the word – see the discussion in John Page and Anne Brower "Of Earthquakes, Red Zones and Property Rights: the Quake Outcasts Case" (2014) 26 NZULR 132 at 136–137 as to other, and wider, conceptions of property. See also art 17 of the International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) which states that "No one shall be subjected to arbitrary or unlawful interference with his … home" and art 12 of the *Universal Declaration of Human Rights* GA Res 217 A(III), A/810 (1948) at 71.

177 See above at [61].

178 Environment Canterbury Regional Council, above n 102, at 62.

as possible".[179]

[137] This intention to facilitate and encourage voluntary withdrawal reinforces the link between the red zone decisions, the purchase offers and recovery from the earthquake and also reinforces the significant character of the decisions. It also highlights the need for such measures to have been the subject of a Recovery Plan. This would have required at least the minimum consultation provided for by s 20 of the Act. Indeed, given the significance of the decisions made for all of Christchurch and in particular for those in the red zones, it may be that further consultation, albeit expedited, would have been required.[180]

Use of s 53 of the Act?

[138] We have held that at least the broad outlines of the purchase decisions should have been included in a Recovery Plan. This is because it was an integral part of the red zoning decisions that those living in the red zones would be encouraged to leave.

[139] Even if (contrary to our view) the Recovery Plan did not need to refer to the purchase decisions, those purchase decisions were so tied to the red zoning decisions, and to government policy in relation to voluntary clearance of the red zones, that the s 53 powers should not have been used unless there had been an antecedent Recovery Plan setting up the red zones.[181]

[140] It is true that the Crown did not use its powers of compulsory acquisition under the Act. However, it is unrealistic to describe the transactions that occurred as voluntary.[182] The inhabitants of the red zones had no realistic alternative but to leave, given the damage to infrastructure and the clear message from the government that new infrastructure would not be installed and that existing infrastructure may

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179 See above at [83] and n 131.

180 See Canterbury Earthquake Recovery Act, s 19(2)(a), (b) and (e). Section 19(2)(e) explicitly recognises that in deciding how to develop a Recovery Plan, the Minister must have regard to the "need to act expeditiously".

181 We are thus in disagreement with the Chief Justice and William Young J on this point.

182 See discussion below at [176].

not be maintained and that compulsory powers of acquisition could be used.[183]

[141] Section 9 of the Act provides that the chief executive has specified functions "for the purpose of giving effect to this Act". These include, under s 9(l), "acquiring, selling or otherwise dealing with land and property under section 53". While it may be possible under s 53 for the chief executive to justify individual or small scale[184] purchases outside the scope of the Recovery Strategy or a Recovery Plan, we do not consider this is possible for widespread purchases on the scale undertaken (and particularly those which are not truly voluntary). The very scale and effect of the purchases puts them squarely within the structures and processes of the Act.

Funding decisions?

[142] It is convenient at this point to deal with the Crown's argument that the Cabinet committee's decisions were funding decisions and not reviewable.

[143] We do not accept that the decisions made in June 2011 can be characterised as funding decisions. The red zoning decision and the related decision to encourage voluntary withdrawal from red zones were significant earthquake recovery measures that should have been made under the Act. It would not be legitimate for the Crown effectively to side-step the Act by characterising such decisions as funding decisions, able to be made outside of the processes required by the Act. That would risk such "funding" decisions not according with the purposes of and bypassing the processes and safeguards provided by the Act.[185] Section 5 of the Canterbury Earthquake Recovery Act provides that the Act binds the Crown. In addition, the Act contemplates voluntary and compulsory acquisition and the Crown has admitted that the chief executive was acting under s 53 of the Act when he made the purchase

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183 If it is the case that, had the government used its compulsory powers, it would have had to operate within the Act's structures of the Recovery Strategy or Recovery Plans, an issue the Chief Justice refers to but does not determine, it would be undesirable for the Crown to avoid the Act's requirements by structuring its offers as "voluntary", while creating conditions that effectively deprive the owners of any realistic choice.

184 And certainly purchases related to the ordinary operation of the office could be justified.

185 We are not suggesting that the Cabinet committee's decisions did not accord with the purposes of the Act in this case but the Crown's argument would leave that possibility open in another case. Although it does not appear that s 10 of the Canterbury Earthquake Recovery Act was expressly considered by the Cabinet committee in June 2011, it is clear from the Brownlee paper that the Committee considered the measures to be necessary for recovery and thus that the measures would meet the s 10 requirements.

offers, rather than acting outside of the framework of the Act.

[144] It is evident that issues around funding have arisen, and will continue to arise, in developing and implementing the Recovery Strategy and Recovery Plans. However, funding issues should run alongside the development of such instruments and not separately. Section 19(2)(c) of the Act requires the Minister, when developing a Recovery Plan, to have regard to possible funding implications and the sources of funding. This suggests that a "funding decision" is not a valid reason for bypassing the Act's procedures.

[145] Funding decisions will of course take into account the general priorities in Government spending as well as the purposes of the Act. The Act must also be read as envisaging that the Recovery Strategy and Recovery Plans would be tailored to take into account available funding. This does not, however, mean that decisions on significant earthquake recovery measures are purely funding decisions.

Conclusion

[146] The whole scheme of the Canterbury Earthquake Recovery Act, its purposes and its legislative history support the view that decisions of the magnitude of those made in June 2011 on recovery measures should have been made under the Act and in particular through the Recovery Plan processes. They were not. That the June 2011 decisions were made outside of the Act undermined the safeguards, community participation and reviews mandated by the Act.

What matters were relevant to the September 2012 decisions?

[147] We now turn to the matters that the appellants say should (and should not) have been taken into account before making the offers to them. First, they say that it was irrational to take into account the insurance status of the properties. Secondly, they say that the purposes of the Act, and in particular that of recovery, were not properly considered. Thirdly, they say that, even if insurance status was relevant in June 2011, given the current situation in the red zones, it is no longer relevant.

Was the insurance status of the properties relevant?

[148] The insurance status of the remaining property owners was seen as determinative in the decision in September 2012 not to extend to the uninsured and uninsurable the same or a similar offer as had been made in June 2011 to insured property owners.

[149] We begin our discussion of this topic by analysing the reasons given for the differential treatment between insured and uninsured/uninsurable properties.

[150] In deferring the decision on uninsured residential properties and residential vacant lots, the June 2011 Brownlee paper noted that:[186]

(a) they were not covered by EQC land or improvements insurance;

(b) the risks of not having insurance should have been factored into the decision to invest in the property; and

(c) the owners of residential properties "should have been aware of the risks when choosing not to purchase insurance".

[151] In the August 2012 paper, the following additional factors were put forward to justify a differential offer:[187]

(a) a non-differentiated offer would compensate for uninsured damage;

(b) a non-differentiated offer would be unfair to other red zone property owners who have been paying insurance premiums; and

(c) a non-differentiated offer would result in moral hazard, due to a reduction in the incentives to insure in the future where insurance is available (because such an offer could create an expectation that the

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186 Brownlee paper, above n 61, at [62].
187 Cabinet paper (30 August 2012), above n 107, at [6] of the recommendations.

government would step in to bail out property owners struck by natural disasters in the future).

[152] We examine each of these factors in turn. As to the first reason in the Brownlee paper, the fact that the properties were not covered by EQC (or private insurance) would obviously have increased the cost to the Crown of purchasing those properties. It does not, however, seem that lack of resources loomed large in the ultimate decisions as to the offers made to those without insurance.[188] Certainly this was not explicitly referred to and, although the cost of the 50 per cent offers was set out, there were no figures given comparing a 100 per cent offer to the uninsured and uninsurable against the offer actually made. Nor was there a comparison with the cost to the Crown of the earlier offers.

[153] As to the second reason, that the risks of not being insured should have been factored into the decision to invest in the property, we assume this was referable to purchasers of vacant land who could not insure.[189] We, however, doubt that many of those purchasing sections for their own residential or other private purposes would have been sophisticated enough investors to take this into account at purchase or to see it as a reason to start construction as soon as possible after purchase, assuming they could afford to do so. We have not been directed to any evidence that the inability to insure vacant land is factored into the cost of land or that potential purchasers are routinely appraised of this risk by real estate agents or that lenders were, at least before the Christchurch earthquakes, unwilling to lend on the security of vacant land for this reason. In any event, earthquakes had not been seen as a high risk in the region.[190]

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188 The Court of Appeal came to a similar view, albeit on a difference basis: see *Quake Outcasts* (CA), above n 6, at [149].

189 This is because any purchasers of residential properties with improvements who had mortgages would have been required to have insurance by their banks. The only property owners who could choose not to insure at purchase (and factor in the risks of that decision) therefore would be those (likely to be in the minority) who were able to buy without a mortgage.

190 The 22 February earthquake far exceeded the seismic modelling for even modern Christchurch buildings. Christchurch was seen as a low-risk area: for example, an engineer quantified the low risk and said the February quake was of a force statistically unlikely to occur more than once in 1000 years: Matthew Dearnaley "Christchurch earthquake: Wrecker's tip for leaning tower" *The New Zealand Herald* (online ed, Auckland, 25 February 2011). Another expert, Dr Quincy Ma, a lecturer in civil engineering at the University of Auckland, was recorded as saying that the fault that shook the city in February had never been identified as a major risk: Simon Collings "Christchurch earthquake: Pre-70s buildings are 'at risk'" *The New Zealand Herald* (online ed,

[154] The third reason in the Brownlee paper was that owners of residential properties "should have been aware of the risks when choosing not to purchase insurance". As was recognised in that paper, owners of vacant lots could not insure.[191] There was thus no issue of a conscious choice not to insure for owners of vacant land. This reason therefore must relate to uninsured residential owners of land and improvements.

[155] As to the uninsured, as against the uninsurable, we do not understand there to have been any inquiry into the individual circumstances of the members of that group, although it was recognised in the August 2012 paper that some had consciously not insured and some were not insured by mistake.[192] In the Quake Outcasts group, it was not in all cases a "choice" to be uninsured. As indicated above, a number of the Quake Outcasts group were uninsured through inadvertence or bad luck.[193] It may be too that any "choice" of others not to insure could have arisen through financial hardship, lack of sophistication or a failure to appreciate the risks.[194] In addition, because of the structure of EQC cover, property owners have to insure for fire to receive natural disaster insurance. An owner is unable to split insurance and only get cover for natural disaster insurance. Because earthquake insurance is not directly insurable, but instead is connected to fire insurance, there was not necessarily a conscious choice not to insure for earthquake damage.

[156] We are not suggesting that failing to take into account individual circumstances was an error. The red zone decisions were made on an area-wide basis, while recognising, for example, that there might be individual properties in the red zones which were not damaged to any significant extent.[195] This was legitimate. It is recognised in the Act, at s 11(3)(a), that the Recovery Strategy may need to

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Auckland, 24 February 2011). As was recognised in Tonkin & Taylor's February 2012 report, the February 22 earthquake "produced the highest vertical and horizontal ground accelerations (how hard the earth shakes) ever recorded in New Zealand": Tonkin & Taylor "Earthquake Commission: Canterbury Earthquakes 2010 and 2011 – Land report as at 29 February 2012" (Report prepared for the Earthquake Commission, February 2012) available at <www.eqc.govt.nz> at 4. In addition, the then chief executive of CERA recognised in his affidavit of April 2013 that as to the Canterbury earthquakes, he understood "that this was the worst damage by such an event in New Zealand, and possibly the world".

191 Brownlee paper, above n 61, at [62].

192 Cabinet Paper (30 August 2012), above n 107, at [43].

193 See above at [88].

194 As noted above at [153] and n 190, the risks were seen as low in any event.

195 See above at [53].

address areas where rebuilding may or may not occur. It was, however, unfair to take into account a factor (that of a conscious choice to remain uninsured) that may not or may not have been applicable to each member of the uninsured group. As we discuss in the next section of this judgment, an area-wide approach suggests an area-wide solution.

[157] As to the first reason given in the August 2012 paper, that a 100 per cent offer would compensate for uninsured damage, this was true but its significance is much reduced by the fact that, in the Brownlee paper, it was anticipated that the offers made to insured residential property owners would cover more than the insurance recoveries. The net cost, after insurance recoveries, was estimated as being from $485 to $635 million. This means that the Crown, in these earlier purchase offers, must have contemplated compensating for uninsured loss. The offer to pay out at 2007 values was of course designed to make the offers attractive and to fulfil the purpose of encouraging the voluntary withdrawal from the red zones (which were considered unsuitable for rebuilding in the short-to-medium term).

[158] The fact that there had already been compensation for uninsured loss for insured property owners covered by the June 2011 decisions was not set out in the August 2012 paper as a factor that was taken into account. It was a relevant consideration and therefore it should have been considered.

[159] In addition, the concern about compensation for uninsured loss is undermined by the fact that in June 2012 the Crown extended 100 per cent offers to red zone properties under construction and non-residential properties owned by not-for-profit organisations.[196] In these cases, the land was not insured and not insurable, but yet the Crown still offered to purchase the property (including the land) at its most recent rateable value. Presumably, the offer to the properties under construction was on the basis that, on completion, when residential insurance cover was secured, those properties would have been eligible for EQC land cover. But there was no present cover. The extension of the offers in June 2012 further diminishes the strength of the

[196] See above at [70].

Crown's argument that it did not wish to compensate for uninsured damage.[197]

[160] Again, we are not to be taken as suggesting that the decisions to compensate at 2007 rateable values for the insured group or to extend that offer to not-for-profit organisations and to homes under construction was in any way inappropriate. Indeed, it is totally consistent, as was recognised in the Brownlee paper, with the necessity of ensuring the recovery of the communities affected by the decisions relating to the red zones, as required by the Act.

[161] As to the second reason of unfairness to those who had insured, this is also mitigated by the fact that some insured property owners would be paid more than the insured value of their properties.[198] We also accept the submission of the Human Rights Commission that it is not clear what steps may been taken to test whether and to what extent insured home owners in the red zone would consider it unfair for their uninsured neighbours to be assisted in similar terms to them. We accept the Commission's point that this is an unjustified assumption of public lack of generosity for those in need that stands in marked contrast to the public's actual response to the earthquakes.[199] In addition, if the Recovery Plan procedure had been implemented as required, the Crown would have had the benefit of community views on these issues.

[162] The third reason, regarding the potential moral hazard of reducing the incentive to insure in the future, cannot readily be applied to vacant land, given that

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197 Indeed, given that a number of the appellants were intending to build homes, the distinction appears arbitrary. For example, one couple had arranged construction insurance, had the building plans drawn up and had obtained resource consent but the Council had put the permit on hold. As a result, at the time of the earthquake, the land was bare. If they had proceeded with a minimal amount of construction they would have received the 100 per cent offer announced by the Crown in June 2012.

198 This is evidenced by the Crown's estimated net cost (after insurance recoveries) of between $485 and $635 million for purchasing insured properties in the red zones: see above at [57] and the Crown's submission recorded at n 85.

199 As to research into Christchurch's community cohesiveness and resilience after the earthquakes, see Louise Thornley and others "Building Community Resilience: Learning from the Canterbury earthquake (Final Report to the Health Research Council and Canterbury Medical Research Foundation, March 2013)" available at <www.communityresearch.org.nz>. See, in particular, 17–25 which discuss the findings as to the community's response to the earthquakes.

insurance and EQC cover is unavailable for vacant land.[200] We accept that the moral hazard arguments are stronger for the uninsured, rather than the uninsurable, but the effect should not be exaggerated. In an affidavit before the Court, Dr Adolf Stroombergen, an economist, outlined why, in his view, the Crown's moral hazard or "precedent" arguments should carry little weight.[201] This moral hazard argument arises from the belief that homeowners will not insure their houses as they may believe the government will, if need be, step in and buy their properties after a natural disaster in the future, thereby rendering natural disaster insurance unnecessary. Dr Stroombergen points out that generally in New Zealand only bundled insurance packages are available to property owners and these cover a variety of risks in one policy (for example, fire, burglary, theft, accidental damage and natural disaster).[202] As a result, Dr Stroombergen believes that "very few policy owners would elect to forego all insurance to achieve any imagined benefit from no longer retaining the natural disaster component".[203]

[163] In any event, moral hazard arguments apply also to those insured, insofar as many were anticipated to be paid more than the value for which their property was insured. This could arguably be seen as creating an incentive for others to structure their future insurance cover in the belief that the government would, in the event of a natural disaster, compensate them fully on the basis of pre-disaster property values. In the case of insured property owners, such moral hazard arguments were not addressed in the June 2011 paper, possibly because they were considered to be outweighed by the wish to encourage voluntary withdrawal from the red zones and by the recovery principles, which in turn arose from the decision that it was inappropriate to leave the situation to the market.[204]

[164] In our view, any moral hazard arising from any purchases (of both insured and uninsured properties) is further diminished when it is considered that the offers to purchase were made in the context of a disaster of major proportions with

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200 This was recognised by the then chief executive of CERA in his affidavit of April 2013 where he recognised that "[i]nsurance was not available for bare land, so the moral hazard issue does not arise".

201 Affidavit of Dr Adolf Stroombergen (10 June 2013).

202 This was made clear in the affidavit of Allan Daly (10 June 2013) at [12], [13], [17] and [18].

203 Dr Adolf Stroombergen, above n 201, at [10].

204 See above at [55] and [56].

widespread damage and significant human cost, both individually and at a community level. They were also made in the context of legislation designed to promote recovery and where an area-wide approach to the creation of the red zones had been taken, as well as a decision to encourage the clearance of those zones.

[165] Finally, we note that the Brownlee paper, when suggesting a "full area-wide land remediation solution", recognised there may have been "isolated pockets of land that fared reasonably well".[205] Questionnaires completed by members of the Quake Outcasts group indicate that some of their properties were not badly damaged. For example, one member said "[t]he land is hardly damaged, the house is repairable and is quite 'liveable'." She said that, when she emailed CERA seeking geotechnical or other information as to her property, the reply from the chief executive on 21 December 2012 was that "CERA does not hold any specific individual property information ... red zoning decisions were made by the Government on an area wide basis rather than by an individual property basis".[206]

[166] We are not suggesting that an area wide approach was erroneous.[207] But the fact that some uninsured or uninsurable individual properties may have fared reasonably well and suffered little damage rather suggests that the harm suffered by the owners at least to a degree relates to government policy rather than their insurance status. It is not a viable option for owners to remain in their properties, even if they are relatively undamaged. As indicated above,[208] the Crown's intention was to facilitate and encourage voluntary withdrawal from the red zones. This has been successful with widespread withdrawal from those zones. In turn this means that services are unlikely to continue to be provided in the long-term.

[167] For all of the above reasons, we do not consider that the insurance status of properties in the red zone should have been treated as determinative when deciding that there should be a differential and, if so, the nature and extent of that differential. We accept, however, that the insurance status of properties was not an irrelevant

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205 See above at [53].

206 Other members of the Quake Outcasts group shared the same concerns. We recognise that none of questionnaires were contained in affidavits and we therefore do not decide whether the owner's views are therefore, in fact, correct.

207 See above at [107]

208 See above at [135]–[137].

factor. Some of the reasons discussed above may have provided justification for a differential.

[168] For example, a distinction between the insured and the uninsured and uninsurable could have taken into account (alongside other relevant factors such as the recovery purpose of the Act) the cost difference for the Crown, provided there had been a clear connection between the offers made and that cost difference. There would, however, have needed to be a rational (and fair) reason why this factor did not apply to the offers made to not-for-profit organisations and to owners of properties under construction.

[169] To take another example: for fairness to those who were insured to have been a good reason for the differential offers, it would have been necessary to address the problem of uninsurable properties and the fact that for some in the Quake Outcasts group there was no conscious choice not to insure. Further, it was relevant that it was anticipated that many of the insured would be paid more than the insurance value of their properties. Why fairness to the insured was so important when they were to be paid full value for their properties (including for some uninsured damage) would have to have been considered.[209]

[170] When it made the decision to create the red zones on an area-wide basis and to encourage the voluntary clearance of the red zones through the June 2011 offers, the Crown set the parameters (and the relevant factors) not only for the June 2011 purchase offers but also for future purchase decisions in the red zones. The September 2012 decisions were not taken in a vacuum. They were linked to the June 2011 and to the subsequent June 2012 decisions. Factors taken into account in those decisions remained relevant factors in September 2012.

[171] This means that, while the insurance status of the properties was not irrelevant, a number of relevant factors (outlined above) do not appear to have been taken into account in deciding on whether or not there should have been differential treatment for the uninsured and uninsurable and, if so, the nature and extent of any differential.

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[209] Along with the other factors discussed above at [161].

Were the purposes of the Act properly considered?

[172] The main purpose of the Canterbury Earthquake Recovery Act is to provide for the recovery of greater Christchurch communities.[210] This involves a holistic approach to restore the "social, economic, cultural, and environmental well-being of greater Christchurch communities".[211] The recovery aspirations of the Act are also evident from the legislative history.

[173] Under s 10, any powers exercised under the Act, including those under s 53, need to be exercised for the purposes of the Act and to be necessary for that purpose. The September 2012 decisions on offers to be made to the uninsured and uninsurable did take into account the need for an incentive to encourage owners to leave the red zones and to provide some funds to owners to start again but s 10 of the Act, and the Act's recovery purpose, does not seem to have been explicitly considered. We thus agree with the High Court and the Court of Appeal on this point.[212]

[174] Given the recovery aspirations of the Act, the question is whether distinguishing between the insured and the uninsured and uninsurable (at least to the extent this occurred) is in accordance with the purposes of the Act.

[175] There is no doubt that the offer of 50 per cent of the land valuation provides limited support for those affected to start up again, hindering economic recovery for most individuals affected, many of whom have limited access to other resources.

[176] The Crown argues that owners in the red zone are free to decide not to sell and that they may remain in the red zone if they wish to do so. However, the reality is that the red zone is no longer suitable for residential occupation. We accept the Human Rights Commission's argument that the red zone decisions meant that residents in the red zone were faced with either leaving their homes or remaining in what were to be effectively abandoned communities, with degenerating services and infrastructure. In light of that stark choice, Panckhurst J, in his judgment, termed

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210 Canterbury Earthquake Recovery Act, s 3(a).
211 Section 3(g).
212 *Quake Outcasts* (HC), above n 6, at [90] and *Quake Outcasts* (CA), above n 6, at [146].

this a "Hobson's choice".[213] We agree.

[177] We accept the Crown's submission that the recovery principle does not mean that the Crown has a duty to each and every resident to do everything possible to ensure that person's individual recovery from the effects of the earthquakes. However, the processes in the Act were designed for the recovery of communities[214] and communities are made up of individuals.

[178] The red zone decisions were made on a community wide basis and this suggests a whole of community approach, rather than separating out particular individuals or groups for differential treatment in a manner that does not support recovery. As the Brownlee paper recognised, the area-wide problem required an area-wide solution and this decision has set the parameters for consequential decisions.[215]

[179] We accept the Crown's submission that the earthquakes and not the Crown caused the land damage in the red zones.[216] It was, however, the Cabinet committee's decision to designate the criteria for delineating the red zones. That the zones may have been differently designated if the criteria were different is a possibility that cannot be discounted. But, even if that were not the case, it was the Government's decision to encourage the voluntary withdrawal from those zones and thus the removal of the communities in the red zones to other areas.

[180] The plight of those left behind in the red zones has thus been exacerbated by the actions of the Crown in making purchase offers to insured red zone property owners. As a result of the acceptance of those offers (which were designed to be attractive), there is no motivation for service providers to continue to provide proper services to those areas and the Crown's decision legitimises the retirement of such services to the red zones. The remaining individuals in the red zone have been effectively left in a dilapidated urban area that will worsen as it is further abandoned. This cannot enhance their recovery from the earthquakes.

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213 *Quake Outcasts* (HC), above n 6, at [93].
214 See s 3(a).
215 Brownlee paper, above n 61, at [36].
216 William Young J makes a similar point in his judgment below at [382].

[181] In terms of the Act, the recovery of the red zone communities had to be considered and, to the extent practical, facilitated. This should have been taken into account in the decisions reached in September 2012.

What should be the effect of the delay?

[182] We now turn to the issue of the delay in decisions being made about the position of the uninsured and uninsurable land in the red zones. We accept that some time to ascertain numbers of those in these categories and costings would have been needed, although this was not articulated as a reason for delaying dealing with the uninsured or uninsurable in June 2011. The delay until September 2012 cannot be justified on the basis of having to ascertain costings and the Crown did not argue that it was. The Crown attempted to justify the delay on the basis of priorities.[217]

[183] There is no doubt that a natural disaster on the scale of the Canterbury earthquakes meant major work and that priorities had to be set. However, there is also no doubt that the living conditions in the red zone have severely deteriorated over the last three years. Infrastructure is deteriorating and will not be replaced, there is no new residential activity and clearance of purchased properties has begun. As was recognised in the August 2012 paper, there are huge infrastructure costs involved in maintaining the infrastructure for those remaining.[218] The September 2012 decisions were taken against this backdrop.

[184] As a result, the context in which the September 2012 offers were made was substantially different to that pertaining in June 2011. Indeed, even in June 2011, one of the criteria identified in the Brownlee paper was that the health or well being of residents was at risk from remaining in areas with land damage for prolonged periods.[219] This new context, and the health and safety concerns set out in the Brownlee paper, were relevant factors and should have been taken into account.

[185] Further, because the offers were not made, as they should have been, in the context of a Recovery Plan, there has been limited opportunity for consultation with

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[217] This reason was set out by Mr Brownlee in his affidavit: see above at [72].
[218] See above at [75].
[219] See above at [52].

those affected by these decisions.[220] In the course of a Recovery Plan process, there would have been the opportunity for some input by those in the position of the appellants and their communities and this may have had an influence on consequential or later decisions.[221] At the bare minimum, this input would have been in the form of an opportunity, as members of the public, to make written comments on the draft plan.[222] However, given the significance of the decisions, it might have been expected that further consultation, albeit expedited, would have been required.[223]

[186] If the Recovery Plan process had been used in June 2011, then it may even have been that the position of other groups of property owners in the red zone (including those in the position of the appellants) would have been dealt with in that process. One advantage of this would have been that all types of property owners could have been considered together allowing for informed comparisons between groups.

[187] The requirement of the Act that such important decisions should involve community input is not just a matter of procedural form, but a matter of substance. The legislative history made it clear that Cantabarians were to have input into the rebuilding of their communities. As was recognised by Megarry J in *John v Rees*, any argument that the consultation would have made "no difference" carries little weight:[224]

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220 While CERA hosted a number of red zone workshops, the minutes of these workshops record that they were in the format of question and answer sessions, rather than a truly collaborative and consultative exercise. A copy of the questions and answers at those workshops can be found at <www.cera.govt.nz/flat-land-residential-red-zone/workshops>.

221 We note that an internal CERA paper dated June 2011 enumerated one of the "cons" of developing a recovery plan as being that there may be a "[c]ommunity expectation that their views may change decisions": see above at [43] and n 59.

222 Canterbury Earthquake Recovery Act, s 20(3)(b).

223 As noted above at [137].

224 *John v Rees* [1970] Ch 345, [1969] 2 WLR 1294 (Ch D) at 402.

> As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.

[188] In conclusion on the issue of delay, we consider this was a relevant factor that should have been taken into account. The situation in the red zones had deteriorated. Many of the June 2011 offers had been accepted and the properties vacated. The fact that the September 2012 decisions were being taken against a totally different backdrop to that pertaining in June 2011 should have been considered. Further, the failure to follow proper processes under the Act, and the associated lack of consultation, means that the individuals left behind had not had the proper opportunity to have input into the decisions affecting them.

Conclusion

[189] This appeal has concerned three main questions: whether the Crown merely provided information in June 2011; whether the procedures under the Christchurch Earthquake Recovery Act should have been used; and what matters were relevant to the September 2012 decisions.

[190] We have rejected the contention that the Crown was merely providing information in June 2011 when identifying the red zones and outlining the offers to be made to insured property owners. The reality is that the Cabinet committee made a number of decisions on important issues, including that a central government response was required and decisions on the criteria for identification of zones.

[191] As to whether the procedures under the Act should have been used, we have concluded that the Act provided a comprehensive regime to deal with earthquake recovery. Significant recovery measures, such as the zoning and purchase decisions made in June 2011, should therefore have been made under the Act.

[192] As to the mechanics, the zoning and related purchase decisions came within

the issues that should have been dealt with under the Recovery Strategy. We have, however, accepted that, given the Cabinet committee's objectives of acting quickly to foster confidence, it was neither necessary nor feasible to await the development of the Recovery Strategy.

[193] The Act does, however, allow Recovery Plans to be developed in advance of the Recovery Strategy. If there are important earthquake recovery measures that should have been dealt with in the Recovery Strategy, had there been sufficient time, the structure and policy of the Act means that the Recovery Plan process should have been undertaken. A Recovery Plan was the appropriate mechanism for implementing the Crown's land classification decisions and could not be circumvented.

[194] Given the close relationship between the zoning decisions and the purchase offers and the area-wide approach, we have concluded that at least the broad outlines of the purchase decisions should also have been dealt with under the Recovery Plan processes.

[195] Even if the purchase decisions were not required to be dealt with under a Recovery Plan, however, we do not consider purchases could lawfully be made under s 53, absent a Recovery Plan dealing with the red zoning decisions. This is because of the close link between the red zoning decisions and the purchase offers, the area-wide nature of those red zoning decisions and the lack of real choice for people in the red zones as to whether to accept the offers (given the warnings given by the Crown about the likely lack of infrastructure and the possible use of compulsory powers).

[196] As to the September 2012 decisions and related offers, we have concluded that, although insurance was not an irrelevant consideration, other relevant considerations weighed against this being a determinative factor. Those factors include the fact that the offers to the insured, not-for-profits and to owners of buildings under construction allowed for payment above that which was insured or insurable. In addition, if some of the uninsured or uninsurable individual properties fared reasonably well and suffered little damage, the harm to their owners has arisen,

at least to a degree, because of government policy of facilitating voluntary withdrawal, rather than their insurance status. These factors and the other factors discussed above should have been taken into account in deciding whether or not there should have been a differential between the insured and the uninsurable and uninsurable and, if so, the nature and extent of any differential.

[197] We have also concluded that, in making the decision as to any differential treatment of the uninsured and uninsurable, the recovery purpose of the Act which, among other things, is to restore the "social, economic, cultural, and environmental well-being"[225] of Christchurch's communities, was not property considered. The area-wide nature of the decisions on the red zones suggests an area-wide community approach to recovery where practical.

[198] We have also accepted the submission of Quake Outcasts that the failure of process and consultation in June 2011 and the delay in extending offers to the uninsured and uninsurable were relevant to the decisions relating to the appellants.

[199] Finally, we have concluded that, when making the September 2012 decisions, the current very difficult living conditions in the red zones was a relevant factor that should have been taken into account.

Relief

Parties' submissions

[200] Quake Outcasts seek a direction under s 4(5)(b) of the Judicature Amendment Act 1972 requiring the respondents to remake the offer in light of the fact that the discount based on insurance cannot legitimately be applied. Additionally, Quake Outcasts asks that leave be reserved to apply for directions in the case that issues with compliance arise.

[201] Fowler Developments seeks a declaration that there is no rational or proportional basis for the distinction between those who received 100 per cent offers and the offers made to vacant residential land owners.

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[225] Canterbury Earthquake Recovery Act, s 3(g).

[202] The Crown submits that the decisions were Cabinet decisions and not reviewable but that in any event the direction sought by Quake Outcasts is inappropriate and relief should be confined to declarations, to which the Crown will then respond.

Discussion

[203] We do not accept the Crown submissions that the decisions were made by Cabinet or a group of ministers on behalf of Cabinet. Legally they were the decisions of the Minister. The input by the Prime Minister and other ministers does not alter the position. We do, however, accept the Crown submission that the relief sought by the appellants goes beyond what would be the usual relief that would be given. We also note the Crown's assurance that it would respond to declarations.

[204] We therefore consider that we should make a declaration that the decisions relating to the uninsured and uninsurable in September 2012 were not lawfully made. The Minister and the chief executive should be directed to reconsider the decisions in light of this judgment.

[205] While we have held that the June 2011 red zone measures should have been introduced under a Recovery Plan, it is obviously now too late for this to occur. In practical terms, a declaration as to the unlawfulness of the June 2011 decisions would not serve any useful purpose and none is made.

Result and costs

[206] The appeal is allowed in part.

[207] There is a declaration that the September 2012 decisions relating to uninsured improved residential property owners and to vacant residential land owners in the red zones were not lawfully made.

[208] The first and second respondents in SC 5/2014 and the respondent in SC 8/2014 are directed to reconsider their decisions in light of this judgment.

[209] Leave is reserved to apply for any supplementary or consequential orders.

[210] The first and second respondents in SC 5/2014 are to pay to the appellants costs of $40,000 plus usual disbursements. We certify for three counsel.

[211] The respondent in SC 8/2014 is to pay to the appellant costs of $20,000 plus usual disbursements.[226] We certify for two counsel.

ELIAS CJ

[212] The background to the appeal is the devastation caused by the major earthquakes suffered in Canterbury between 4 September 2010 and 23 December 2011 and the legislative response contained in the Canterbury Earthquake Recovery Act 2011. The appellants own land in Christchurch within an area the Government identified in June 2011 as being unsuitable for building or rehabilitation within the medium term. Government policy has been to encourage the inhabitants to move away from this "red zone". The encouragement has entailed making offers to purchase the properties within the red zone on behalf of the Crown, facilitating Crown management of the area as open space pending its rehabilitation and further decisions as to its future use. To date, the powers under the Act to compel changes to the zoning of the affected areas or to acquire the properties compulsorily have not been used. Instead, a programme of voluntary acquisition was initiated in June 2011 for those residential properties which were insured for land damage under the Earthquake Commission Act 1993, through the levy imposed by that Act on premiums for fire insurance.

[213] The offers for the insured residential properties were pitched at 100 per cent of the latest rating valuation of 2007 (subject to adjustment in cases of underinsurance).[227] Government policy papers at the time made it clear that it was expected that something in the order of two-thirds of the purchase price paid if offers were accepted would be recovered through assignment of insurance claims. The

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[226] The costs are set at a lower level than for Quake Outcasts because of the secondary role played by Fowler Developments' counsel in the argument.

[227] Where properties were underinsured by more than 20 per cent against the 2007 rating valuation, the offer was reduced by the percentage of underinsurance.

owners of insured properties were given two options: receiving the full rating value and assigning all insurance claims to the Crown; or receiving the land component of the rating value and assigning their statutory cover by the Earthquake Commission for the land damage to the Crown (leaving the owners able to deal with their insurers for the improvements where they were thought to exceed the 2007 rating valuations). The uptake on these offers was overwhelming.

[214] The appellants' properties were not insured for land damage: either their properties comprised bare land, for which there was no private insurance available; or their homes did not have statutory cover under the Earthquake Commission Act because they were not insured against fire, as is required under that Act for cover.[228]

[215] In September 2012 the owners without land insurance received offers of purchase from the chief executive of the Canterbury Earthquake Recovery Authority on behalf of the Crown at 50 per cent of the 2007 rating value of the land component only. (Those whose properties contained uninsured dwellings could salvage building materials or remove the buildings.)

[216] Quake Outcasts is an association of 46 residential property owners whose homes were not insured at the time of the earthquakes or who had not yet built on residential lots. Fowler Developments Ltd is a housing developer which owns 11 residential bare lots originally in the orange zone, but brought within the red zone in November 2011. Quake Outcasts and Fowler Developments each brought judicial review proceedings to challenge the September 2012 offers by the chief executive. They sought orders that the chief executive offer to purchase their properties at 100 per cent of the 2007 rateable value for land and improvements, the basis of the offers made in June 2011 to those who had insurance.

[217] The applications for judicial review were wide-ranging and were met by wide-ranging defences. The questions raised included the legal effect of the Government's identification of the red zone (which preceded all offers and on which they were predicated) and whether the zone could lawfully have been announced and acted on for the purposes of the offers without first adopting a Recovery Strategy or

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[228] Earthquake Commission Act 1993, s 18.

Recovery Plan under the Canterbury Earthquake Recovery Act (a process which gave opportunities for public participation). The litigation raised, too, questions about the source of the power relied on by the chief executive in making the offers of purchase and whether its exercise was lawful. Some of the matters of dispute which were raised in the High Court and Court of Appeal are no longer in issue.

[218] In this Court, it is accepted that the offers which are challenged were made by the chief executive under s 53 of the Act, which authorises the chief executive to purchase property on behalf of the Crown. It is also accepted that the chief executive did not observe the requirement of s 53 that he act in accordance with s 10 of the Act. Section 10 requires the chief executive, in exercising any of the powers conferred on him by the Act, to ensure that he does so "in accordance with the purposes of the Act" and on the basis that "he or she reasonably considers it necessary". Since it is now not in dispute that the chief executive failed to observe s 10 in arriving at the offers, it is also no longer in dispute that the offers must be quashed and the decision sent back for reconsideration by the chief executive, as indeed the Court of Appeal ordered.[229] No appeal against those orders is brought by the Crown parties.

[219] Instead, Quake Outcasts and Fowler Developments appeal against the basis of the reconsideration ordered by the Court of Appeal and against its rejection of their contention that the establishment of the red zone was unlawful.

[220] As to reconsideration of the offer, the appellants contend that the Court of Appeal was wrong to hold that the chief executive could lawfully distinguish between property insured for land damage and property not so insured when setting the terms of the offers to purchase. They seek orders that would compel the Crown to offer to purchase their land and improvements at 100 per cent of the 2007 rating valuation.

[221] As to the lawfulness of the red zone, the appellants say that the establishment of the red zone by ministers acting under Cabinet authority was unlawful because it

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[229] *The Minister for Canterbury Earthquake Recovery v Fowler Developments Limited* [2013] NZCA 588, [2014] 2 NZLR 587 (O'Regan P, Ellen France and Stevens JJ) at [148] and [166]–[168].

was not taken under the Act and in accordance with its scheme, which required prior adoption of a Recovery Strategy or Recovery Plan after opportunity for public input. They say the red zone has "effectively eliminated any market for the properties" within it and is preventing their recovery from the effects of the earthquakes, contrary to the purpose of the legislation. In the High Court they sought declarations that the red zone establishment was unlawful and that those property owners who do not wish to sell to the Crown are "entitled to remain on their properties, supported by essential facilities, as permitted by law".

The scheme of the legislation

[222] The Canterbury Earthquake Recovery Act 2011 came into effect on 19 April 2011. The Act set up a framework under which the huge effort required to respond to the damage caused by the earthquakes could be coordinated. The responses necessary were principally for the Minister for Canterbury Earthquake Recovery and the chief executive of the Canterbury Earthquake Recovery Authority. In addition, important roles were recognised under the legislation for local government. The Minister was required to set up a community forum under s 6 of the Act to provide the Minister and the chief executive with information or advice in relation to the operation of the Act, to which they were obliged to have regard. A separate Parliamentary forum, comprising members of Parliament living in greater Christchurch or representing constituencies in greater Christchurch was to be established under s 7, also to provide the Minister with information or advice in relation to the operation of the Act.

[223] The purposes of the Act are contained in s 3:

> **3 Purposes**
>
> The purposes of this Act are—
>
> (a) to provide appropriate measures to ensure that greater Christchurch and the councils and their communities respond to, and recover from, the impacts of the Canterbury earthquakes:
>
> (b) to enable community participation in the planning of the recovery of affected communities without impeding a focused, timely, and expedited recovery:
>
> (c) to provide for the Minister and CERA to ensure that recovery:

(d) to enable a focused, timely, and expedited recovery:

(e) to enable information to be gathered about any land, structure, or infrastructure affected by the Canterbury earthquakes:

(f) to facilitate, co-ordinate, and direct the planning, rebuilding, and recovery of affected communities, including the repair and rebuilding of land, infrastructure, and other property:

(g) to restore the social, economic, cultural, and environmental well-being of greater Christchurch communities:

(h) to provide adequate statutory power for the purposes stated in paragraphs (a) to (g):

…

[224] Section 10(1) and (2) provide:

10 Powers to be exercised for purposes of this Act

(1) The Minister and the chief executive must ensure that when they each exercise or claim their powers, rights, and privileges under this Act they do so in accordance with the purposes of the Act.

(2) The Minister and the chief executive may each exercise or claim a power, right, or privilege under this Act where he or she reasonably considers it necessary.

[225] Principal functions conferred upon the Minister under the Act were to recommend for adoption by Order in Council an overarching Recovery Strategy for greater Christchurch (with opportunity for local government and community input, including at public hearings), and to direct "responsible entities" (identified under the Act as the chief executive of CERA, councils, government departments, Crown entities or instruments, "requiring authorities" under the Resource Management Act 1991, and network utility operators) to develop Recovery Plans for all or part of greater Christchurch, for approval by the Minister after notification of drafts and opportunity for written comments by a date specified in the notice.[230]

[226] A Recovery Strategy may specify:[231]

(a) the areas where rebuilding or other redevelopment may or may not occur, and the possible sequencing of rebuilding or other redevelopment:

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230 Canterbury Earthquake Recovery Act 2011, ss 4, 8 and 16.

231 Section 11(3).

(b) the location of existing and future infrastructure and the possible sequencing of repairs, rebuilding, and reconstruction:

(c) the nature of the Recovery Plans that may need to be developed and the relationship between the plans:

(d) any additional matters to be addressed in particular Recovery Plans, including who should lead the development of the plans.

The effect of a Recovery Strategy is explained in s 15 of the Act:

> **15 Effect of Recovery Strategy**
>
> (1) No RMA document or instrument referred to in section 26(2), including any amendment to the document or instrument, that applies to any area within greater Christchurch may be interpreted or applied in a way that is inconsistent with a Recovery Strategy.
>
> (2) On and from the commencement of the approval of a Recovery Strategy, the Recovery Strategy—
>
> (a) is to be read together with and forms part of the document or instrument; and
>
> (b) prevails where there is any inconsistency between it and the document or instrument.
>
> (3) No provision of the Recovery Strategy, as incorporated in an RMA document under subsection (2)(a), may be reviewed, changed, or varied under Schedule 1 of the Resource Management Act 1991.

[227] A draft Recovery Strategy must be developed in consultation with those persons or bodies the Minister is directed under the Act to consult and those persons or bodies the Minister considers it appropriate to consult.[232] The draft must be notified and there is a requirement for public hearings to be held before it is adopted by Order in Council on the recommendation of the Minister.[233] Once enacted by Order in Council, no instrument or document adopted under the Resource Management Act is to be interpreted or applied inconsistently with the Recovery Strategy.[234] The Strategy itself is to be read together with and to form part of any Resource Management Act instrument or document, but may not be changed or varied using the procedures under the Resource Management Act.[235]

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232 Section 11(4).
233 Sections 11–13.
234 Section 15(1).
235 Section 15(2) and (3).

[228] Recovery Plans are provided for by ss 16–26. The Act itself requires a Recovery Plan to be developed for the whole or part of the central business district under the leadership of the Christchurch City Council.[236] In the balance of greater Christchurch the development of Recovery Plans is a matter the Minister may direct a "responsible entity"[237] to undertake, following any procedure specified by the Minister. The matters for the Plan are to be the subject of direction by the Minister, and "may include provision, on a site-specific or wider geographical basis" for:[238]

(a) any social, economic, cultural, or environmental matter:

(b) any particular infrastructure, work, or activity.

[229] In setting the procedure for the development of a Recovery Plan, the Minister is required to have regard to:[239]

(a) the nature and scope of the Recovery Plan; and

(b) the needs of people affected by it; and

(c) the possible funding implications and the sources of funding; and

(d) the New Zealand Disability Strategy; and

(e) the need to act expeditiously; and

(f) the need to ensure that the Recovery Plan is consistent with other Recovery Plans.

[230] The development and consideration of a Recovery Plan is not subject to the provisions of the Resource Management Act and consultation is required in respect of the development and consideration of a Recovery Plan only to the extent required by the Minister in his directions as to procedure and through notification of the draft and the ability to provide written comments on it.[240] The powers of the Minister to set the procedure to be followed would permit the period for submissions to be limited where there is a need to act expeditiously.[241]

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236 Section 17.

237 Defined in s 4 to mean: "the chief executive, a council, a council organisation, a department of the Public Service, an instrument of the Crown, a Crown entity, a requiring authority, or a network utility operator".

238 Section 16(2).

239 Section 19(2).

240 Section 19. Further requirements are placed upon the Minister in relation to the CBD: s 17.

241 Section 19(2)(e).

[231] After notification in the Gazette, local authorities and those exercising functions under the Resource Management Act are obliged to act consistently with the Plan.[242] Decisions made under the Resource Management Act must not be inconsistent with a Recovery Plan in respect of matters identified in s 23(1) (concerning grants, notices of requirement, transfer of resource consents, changes and reviews of resource consents, and review and changes to Resource Management documents). If amendments to Resource Management Act documents are required to give effect to a Recovery Plan councils must amend the relevant RMA documents.[243] Instruments specified in s 26 of the Act (relating to plans under the Local Government Act 2002 and the Land Transport Management Act 2003 and strategies, policies and plans approved under the Conservation Act 1987, the Reserves Act 1977, the Wildlife Act 1953 and under other enactments authorising management plans for reserves) must not be inconsistent with a Recovery Plan.

[232] In addition to the ability to direct the content and procedure to be followed in setting a Recovery Strategy and Recovery Plans, the Minister is given direct powers to intervene in respect of a range of controls under the Resource Management Act under s 27 of the Act and to recommend the adoption of Orders in Council for the purposes contained in s 3(a) to (g) of the Act.[244] They include orders modifying, exempting, or extending the provisions of any enactment (defined in s 4 not only to include the primary and delegated legislation identified in s 29 of the Interpretation Act 1999 but also to include "any plan, programme, bylaw, or rule made under any Act").[245] The power to make Orders in Council for the purpose of the Act includes the power to grant exemptions from, modification and extensions of enactments in particular under the Building Act 2004, the Resource Management Act, the Earthquake Commission Act, the Health Act 1956, the Local Government Acts, the Public Works Act 1981 and the Rating Valuations Act 1998.[246]

[233] The powers conferred include those to suspend, amend or revoke Resource Management plans, bylaws and other instruments and to cancel or suspend resource

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242 Section 23.
243 Section 24.
244 Section 71(1).
245 Section 71(2).
246 Section 71(3).

consents, existing use rights, and certificates of compliance.[247] In addition, under ss 48–50 of the Act, powers are conferred upon the Minister to give directions to councils to take or stop any action, and as to the performance of any functions or the exercise of any powers. In the event of non-compliance, the Minister can call-in and exercise any of the powers of councils.

[234] No obligations of consultation are imposed on the Minister in connection with these powers, although they must be exercised in conformity with s 10 and therefore the s 3 purposes of the Act which include enabling "community participation in the planning of the recovery of affected communities without impeding a focused, timely, and expedited recovery".

[235] Although the powers conferred on the Minister may impact adversely on individual property owners (for example, in overriding existing use rights), s 67 makes it clear that, apart from specific provision for compensation in the Act for compulsory acquisition of property or arising out of the demolition of dangerous buildings, nothing in the Act "confers any right to compensation or is to be relied on in any proceedings as a basis for any claim to compensation". Section 67 also excludes the application of the compensation provisions in s 185 of the Resource Management Act in relation to any matter to which subpart 5 applies.

[236] No doubt because of the extent of the powers conferred (which permitted orders with retrospective effect to the date of the 4 September 2010 earthquake, gave such orders the force of law as if enacted as part of the Act, and which prevented the recommendation of the Minister being challenged or called into question in any court),[248] the Act provides for review of proposed orders by a panel of experts, including a former or retired judge of the High Court or lawyer, as well as envisaging Parliamentary oversight, both general and as enhanced by the Act.[249]

[237] The chief executive of the Authority has powers under the legislation to collect and disseminate information. Under s 53 the chief executive may purchase any land or personal property in the name of the Crown. In addition, the chief

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247 Section 27(1) and (2).
248 Sections 74 and 75.
249 See ss 72–76 (Review Panel); and s 7 (Cross-party forum).

executive has powers of compulsory acquisition under ss 54–58, with consequential rights to compensation under ss 60–67. But there is no general right to compensation by the Crown arising out of earthquake damage and the exercise of powers under the Act, as s 67 makes clear.[250]

[238] The Minister is required to report quarterly on the operation of the Act.[251] The Minister must also present an annual report on the operation and effectiveness of the Act every 12 months.[252]

Background to the offers

[239] By June 2011 the rebuilding of Christchurch seemed stalled. Significant earthquakes were still occurring. Decisions on insurance, building consents, and the status of affected land were largely on hold, preventing affected communities from being able to move forward, while expert assessment identified where remediation of land was feasible. Ministers were understandably anxious to provide as much certainty as was possible so that decisions could be taken where rebuilding was appropriate. Considerable engineering information had been obtained by the Government in the months since the 22 February 2011 earthquake and there was urgency in its public release. The Cabinet paper of 24 June 2011 which recorded the decisions taken on 22 June spoke of the need for a "circuit-breaker … to arrest the current decline in confidence and to form a solid basis for recovery".[253]

[240] Further earthquakes in June 2011 added to the uncertainty and led to the Cabinet decision on 20 June to delegate decision-making about land remediation directions to a group of eight senior ministers.[254] They were empowered by Cabinet to act until 27 June (the date of the next Cabinet meeting). The senior ministers made the decisions as to future directions on 22 June and they were announced

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250 **67 No compensation except as provided by this Act**
(1) Nothing in this Act, apart from this subpart or section 40 or 41, confers any right to compensation or is to be relied on in any proceedings as a basis for any claim to compensation.
(2) Nothing in section 185 of the Resource Management Act 1991 applies in relation to any matter to which this subpart applies.

251 Section 88.

252 Section 92.

253 Memorandum for Cabinet "Land Damage from the Canterbury Earthquakes" (24 June 2011) at [19].

254 Similar delegation was conferred on 23 May 2011 but had expired on 6 June.

publicly on 23 June 2011. The decisions and the basis for them were reported to Cabinet in a paper of 24 June 2011.

[241] Cabinet was advised by the Minister for Earthquake Recovery in the paper of 24 June 2011 that, instead of a programme to assess each parcel of land individually for suitability for remediation, "a full area-wide land remediation solution" was necessary.[255] The paper described the process adopted for classifying affected areas according to whether immediate repairs were feasible (a "green" zone), those where further work was necessary to decide whether repairs were feasible (the "orange" and "white" zones) and those where remediation of the land was considered uneconomic ("red" zones).[256] The classification of land according to these categories was based on "the severity and extent of land damage, the cost-effectiveness and social impacts of land remediation".[257] The land within the red zones was assessed to be at risk of further damage in the event of further seismic activity, floods, and spring tides and to require rebuilding of infrastructure. The paper indicated that the red zone comprised areas where rebuilding "may not occur in the short-to-medium term because the land is damaged beyond practical and timely repair".[258]

[242] In the residential red zone, properties relatively undamaged would be caught up in the remedial works on neighbouring properties and could be "at risk" from the work.[259] It was estimated that the works necessary could take more than five years and that it was desirable to relocate all residents while they were carried out.[260]

[243] The paper reported and explained the decision to make offers of purchase to owners of insured residential properties within the red zone. Ministers had taken the view that it was not appropriate to leave private insurance claims within the red zone to "play out without any intervention".[261] There was uncertainty about the extent to which private insurance would cover the costs of the extensive remedial work

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255 Memorandum for Cabinet "Land Damage from the Canterbury Earthquakes" (24 June 2011) at [38].
256 At [10].
257 At [10].
258 At [10](c).
259 At [38].
260 At [39].
261 At [50].

required. The ministers considered that leaving things to be worked out between individuals affected and their insurers would not meet the objects of the legislation in providing certainty and confidence through a simple process.[262]

[244] These considerations led to the offers to purchase at 100 per cent of the 2007 rating valuation for those whose homes were insured. Such offers were said to ensure that the equity of home-owners in their properties would be preserved. The paper itself considered that the properties currently had "minimal value".[263]

[245] This proposal may not have entailed recourse to the coercive powers available under the legislation to clear the area, but it is clear that the offers were pitched to encourage relocation of those who were insured and Crown ownership of the land.[264] And the policy of Crown acquisition and preference for clearance was reinforced by messages sent to the property owners with the offers pointing out that insurers might not be willing to renew policies in the red zone and might even cancel them, that the Council and utility providers might conclude that maintenance of services was not practicable within the zone, and that ultimately the Crown might have to compulsorily acquire the land at its then value which was likely to be substantially below the price then on offer.

[246] The resulting depopulation expected as a result of acceptance of the offers was itself expected to accelerate the running down of infrastructure and services, as was made clear in the Cabinet paper of 24 June 2011. It is clear too that the policy adopted was to encourage that effect. The infrastructure available within the red zone was identified as an issue in the paper. While there was no talk of use of the coercive powers under the Act to direct Councils in connection with the provision and maintenance of infrastructure and services, the paper advised that the relevant Councils would be "asked to discuss any proposed maintenance and repair plans, for the infrastructure in these areas, or any proposed regulatory interventions for the areas" because of the view taken that "[as] a result of these offers there is unlikely to

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262 At [50].

263 At [89].

264 As is pointed out by Glazebrook J at [83] when subsequently property in the Port Hills was moved from white to red status, it was without adopting a similar policy of clearance and Crown ownership.

be any justification in the near to medium term for the infrastructure and services in these areas to receive any more than temporary repairs".[265]

[247] Successful implementation of policies designed to achieve population relocation and expected to have an impact on the need for maintenance and repair of services and infrastructure inevitably added to the uncertainty and hardship being experienced by those to whom offers were not being made in June 2011. That uncertainty and hardship could reasonably have been seen to be likely to be exacerbated if there was significant delay in addressing the position of those property owners who were not eligible to receive the June 2011 offers.

[248] Their position had been acknowledged in the Cabinet paper of 24 June 2011. The paper advised that "[c]onsideration will need to be given over time to the position of these people":[266]

> Neither uninsured residential properties nor vacant lots are covered by EQC land or improvements insurance. For residential owners, the risks of not having insurance were risks that ought to have been considered when making the decision to invest in the property. Residential owners should have been aware of the risks when choosing not to purchase insurance. Vacant lot owners were not eligible for EQC or private insurance cover.

[249] At the time announcements were made in June 2011, it seems to have been envisaged that the position of these uninsured owners would be considered within a matter of weeks. The eventual fifteen month delay was explained by the Minister in an affidavit in the proceedings as having been caused by the need for the Authority to prioritise its efforts.

[250] The Authority had much to do. In particular, there was pressing need to work out how the rehabilitation of properties and land within other areas identified as orange and white zones (in which decisions about rebuilding and reinstatement had yet to be made) was to be progressed. Even so, once the decisions had been taken that rehabilitation in the medium term of land within the residential red zone was not feasible and that clearance and Crown ownership were to be encouraged (with an

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[265] Memorandum for Cabinet "Land Damage from the Canterbury Earthquakes" (24 June 2011) at [52].

[266] At [62]–[63].

expectation that infrastructure and services would be affected), Government effort to respond to the position of uninsured and non-residential property owners in the red zones does not seem to have been comparable to the effort necessary to make progress in the orange and white zones. Nor is it clear it would have entailed competition for resources. The sort of geophysical and social assessments still to be undertaken for the orange and white zones before future directions could be set had been completed for the residential red zone with the adoption of the June 2011 policies. The further policy directions to be set were as to whether offers to purchase were to be made and, if so, on what terms.

[251] In May 2012 the Minister proposed offers of 100 per cent to seven not-for-profit organisations which had insurance for improvements but were not eligible for the Earthquake Commission cover for land.[267] Similar offers were to be made for residential properties where homes were under construction, if they were covered by insurance for the building work, even though they were not eligible for Earthquake Commission cover for the land.

[252] That left insured residential leasehold properties, vacant land and uninsured residential properties, and insured commercial or industrial properties. A Cabinet paper approved by the Minister on 30 August 2012 eventually dealt with the position of these groups of property owners.[268] Insured commercial and industrial property owners received an offer based on 100 per cent of the 2007 valuation for improvements and 50 per cent of the land value (which was not eligible for Earthquake Commission insurance since it was not residential).[269] Although vacant land was not eligible for Earthquake Commission insurance, the Minister proposed a 50 per cent offer to encourage the owners to move on and to reflect the fact that there was some residual value in the land (although it was considered to be well below the 50 per cent offer). The owners of insured residential leasehold properties, which were subject to perpetual leases on land owned by the Waimakariri District Council, received offers based on 100 per cent of the rating valuations, putting them in the

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267 Cabinet Paper "Red zone residential properties under construction and non-residential properties owned by not-for-profit organisations" (signed by the Minister on 25 May 2012).

268 See Cabinet Paper "Red Zone Purchase Offers for Residential Leasehold, Vacant, Uninsured, and Commercial/Industrial Properties" (signed by the Minister on 30 August 2012).

269 As with the offers made in June 2011, the property owners had the option of accepting 50 per cent of the land value and retaining their private insurance rights.

same position as the insured properties which had received offers under the June 2011 decisions.

[253] Residential properties which were not insured or which had not maintained insurance were to be offered 50 per cent of the 2007 value for the land only but had rights to salvage building materials or relocate uninsured buildings. These proposals became the basis of the offers announced on 13 September. The offers were accompanied by information which mirrored that provided with the June 2011 offers regarding the likely running down of infrastructure and services within the residential red zone and the possibility that the Crown would later compulsorily acquire the properties at value unlikely to match the offers.

[254] After the decisions of June 2011 and while the ministers were considering the approach to be taken to those in the red zone who were uninsured, a draft Recovery Strategy was being developed and was eventually adopted in May 2012. It did not deal with the areas where rebuilding could occur. The Recovery Strategy acknowledged that when the legislation was passed it had been envisaged that this assessment would form part of the Recovery Strategy. It explained that it had not proved possible to address questions of zoning and timing of rebuilding in the Recovery Strategy because the task had been too large and too complex. Nor was it "yet clear where Recovery Plans – which are statutory documents with the power to overwrite a range of planning instruments – will be the most appropriate and effective way to provide direction".[270]

[255] The Recovery Strategy referred to decisions taken outside the Recovery Strategy processes under the Act in respect of the residential red zone, noting that clearance of the residential red zone was occurring to "return … the land to open space". The process was described as consisting of "three stages over two to three years":[271]

> The first stage is to remove built structures and services. The second will involve larger-scale land clearance and grassing. The final stage will be to

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[270] Canterbury Earthquake Recovery Authority "Recovery Strategy for Greater Christchurch" (June 2012) at 2.

[271] At 40.

> liaise with utility providers to remove public infrastructure no longer needed. After that, Land Information New Zealand will manage the open space.

[256] In the development of a "Land Use Recovery Plan", directed to be undertaken by the Minister, it was acknowledged that the "significant hazard" had already been addressed through establishment of the red and green zones.

The appeal

[257] The Court of Appeal allowed an appeal against the determination of Panckhurst J in the High Court that the June 2011 decision was not lawfully made.[272] But it affirmed the decision of the High Court that the September offers were themselves unlawful. The Court of Appeal considered that offers were made under s 53 and accordingly had to comply with s 10 of the Act. It held the chief executive had failed to comply with s 10 because he had failed to take into account the purposes of the Act under s 3. Unlike the June 2011 decision to offer 100 per cent of the 2007 rating valuations, the Court of Appeal considered there had been no attempt to ensure that the offers were "calibrated to allow … home owners in the red zone to move on with their lives with confidence, simplicity and certainty".[273]

[258] The purpose of recovery from the earthquakes "was not brought to bear in the September 2012 decision" beyond an indication in the Cabinet paper of 30 August 2012 that the 50 per cent offer would provide "some support for recovery elsewhere".[274] The Court of Appeal took the view that the decision on the face of the Cabinet paper was based, not on the recovery of those affected, but simply on three reasons identified in the paper why it was not appropriate to extend the June offer to those who were uninsured: "it would compensate for uninsured damage, it would be unfair to those who had paid for insurance, and it would create a moral hazard" (because it would encourage dependence on government rather than private insurance).[275]

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272 *Fowler Developments Ltd v Chief Executive of the Canterbury Earthquake Recovery Authority* [2013] NZHC 2173, [2014] 2 NZLR 54 (Panckhurst J).

273 *The Minister for Canterbury Earthquake Recovery v Fowler Developments Limited* [2013] NZCA 588, [2014] 2 NZLR 587 at [137]–[138].

274 At [140].

275 At [140].

[259] The Crown parties did not appeal the decision of the Court of Appeal that there was failure to comply with s 10. They accept that the exercise of the power under s 53 must be reconsidered in accordance with the recovery requirements of the Act, as the Court of Appeal ordered.[276]

[260] The acceptance that the offers were made under s 53 effectively overtakes the argument of the respondents that sufficient authority for the offer was to be found in the Cabinet approval of the funding on which it was based (necessary to authorise an appropriation under the Public Finance Act 1989). As the Court of Appeal said of this argument, obtaining the necessary financial authority to comply with the Public Finance Act did not detract from the fact that the offers themselves were made by the chief executive under s 53.

[261] Reconsideration of the exercise of the s 53 powers will have to address the circumstances as they now exist when taking into account the purposes of the Act in promoting recovery. That may well require consideration of the delay and its effect and the hardship caused by depopulation of the red zone in the meantime, with associated running down of its infrastructure and amenities.[277] Given the fact that the decision has to be taken over again on a wider basis, it is not appropriate to enter into assessment of the factors that will be relevant, beyond indicating what they may include in dealing with the points raised by the present appeal.

[262] The appellants were granted leave to appeal on two points.[278] I deal with them in reverse order to the order in the leave judgment. The first is whether there was a rational basis for the distinction drawn between those owners who were insured and those who were uninsured. The second is concerned with lawfulness of the establishment of the red zone and the Crown alternative responses: that the zone had no legal effect and was simply the provision of expert information obtained by the Crown as to the physical consequences of the earthquakes; and that the Government decisions were in any event ones that it was able to take outside the framework of the Canterbury Earthquake Response Act.

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276 At [148] and [166]–[168].
277 See also the points made by the Court of Appeal referred to by me at [257]–[258].
278 *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2014] NZSC 51.

(1) Was insurance a proper basis for distinction?

[263] The appellants have challenged the finding of the Court of Appeal that there is no reviewable error in the approach which differentiates between the appellants and those who received offers amounting to 100 per cent of the 2007 rateable value of their property on the basis of whether or not they were insured. This determination was fatal to the attempt to obtain a direction from the Court of Appeal, in application of a principle of even-handedness, that the Crown pay the appellants who wished to sell 100 per cent of the rateable value of their properties.

[264] The Court of Appeal held:[279]

> [150] We accept that there is a rational basis for differentiating between insured residential property owners and uninsured owners such as the respondents, given the potential value to the Government of the rights against EQC and insurers that were assigned to the Government under the contracts resulting from the 100 per cent offers. That is the very differentiation made in the June 2011 decision and the September 2012 decision. We do not accept that the mere fact that a different approach was taken in relation to the respondents than in relation to the recipients for 100 per cent offers constitutes a reviewable error.

This conclusion, it seems to me, is a statement of the obvious.

[265] The Court of Appeal was careful not to express any view on the weight reasonably to be given in the comparison of the treatment of the insured and uninsured property owners to the lack of comparable off-set provided by recovery of insurance. It could not properly have done so given the view that the circumstances needed reconsideration in the light of s 3 and especially the recovery principle.

[266] In any such further comparison it may be necessary to confront the fact that, as the Court of Appeal said, the Cabinet papers associated with the June 2011 offer do not seem greatly to have emphasised the recovery of insurance.[280] In those circumstances, the Court thought it hard to say that the likely recovery from the Commission and insurers "loomed large in the decision making".[281] If the recovery of insurance did not loom large in the decision making in June 2011, it may suggest

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279 *The Minister for Canterbury Earthquake Recovery v Fowler Developments Limited* [2013] NZCA 588, [2014] 2 NZLR 587.

280 At [149].

281 At [149].

that distinguishing between property owners on the basis of their insurance status is not reasonably to be treated as a principal consideration in addressing the position of those who were not eligible to receive the 100 per cent offers.

[267] Although it is suggested that the offers were generous when compared with the likely value of the land as at June 2011,[282] when the decisions as to Crown acquisition and encouragement of clearance were made, the June 2011 offers were not based on post-earthquake valuations, almost certainly because of the policies of encouraging clearance and promoting the policies of the Act in recovery. The same policies may be thought to apply, in application of s 3, to the uninsured owners, even if some differentiation in the offers made to them and to the insured homeowners is appropriate. If so, the post-earthquake values of the land may not be particularly material to the decision still to be made, especially since the benchmark provided by the 2007 rating valuations was accepted for the purpose of the June 2011 offers.

[268] The adoption of the red zone classification may itself have depressed the market value of the land, following the earthquakes. As the June Cabinet paper acknowledged, some of the properties within the zone were less affected than others but the view was taken that there were benefits in an area-wide response, including to facilitate Crown rehabilitation and determination of future use.[283] In those circumstances, it may be appropriate in the s 53 reconsideration in accordance with s 3 to take into account the benefits to the wider community in the area-wide preference.

[269] If the area-wide offers have had the practical effect of circumventing the policy of the legislation in community participation in identification of areas where rebuilding should not take place or should be sequenced, then it may be that the disempowerment is also a circumstance to be taken into account in dealing with the owners who remain.

[270] The original linkage of the offer with the Earthquake Commission cover both in the June 2011 offer and in the September offer was fairly crude. Such cover is

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[282] Including by William Young J at [365].

[283] Memorandum for Cabinet "Land Damage from the Canterbury Earthquakes" (24 June 2011) at [38].

ancillary to the improvements, being confined to land within 8 metres of the dwelling and capped at $100,000 (plus GST).[284] The offers made in June 2011 were for the rateable value of the unimproved land as a whole. It may be that the value of the land component is substantially exhausted by the value of the house and its site and that the cap of $100,000 is generally in line with the offer of 100 per cent of the valuation, but it is not self-evident that it explains the difference in the offers. The offer made to insured residential owners (100 per cent of the rating value of the land at 2007) was acknowledged to have been in most cases substantially higher than the post-earthquake value. Nor was the basis on which the 50 per cent figure was arrived at in September 2012 greatly explained in the 30 August 2012 Cabinet paper.

[271] The Court of Appeal also pointed out that the suggestion in the 30 August Cabinet paper of the need to avoid a "moral hazard" in equivalent treatment of those who were insured and those who were not ran up against the point that a number of the owners could not insure and others had made "slip ups" in circumstances where moral culpability was not a helpful concept.[285] Indeed, in speaking of the need for principles applied "on a more generic level", the Court acknowledged the significant impact on the lives of those in the position of the Quake Outcasts:[286]

> While the recipients of the 100 per cent offers have, for the main part, been able to apply the proceeds of the Crown offer towards buying a new home elsewhere, many of the respondents are left in a very precarious position because of the very significant shortfall between the amount derived from the offer and the cost of acquiring a home elsewhere. In many cases they are retired and not in a position to take on any significant debt. We acknowledge the significant impact this is having on their lives.

[272] There were a number of inconsistencies in the treatment of those who were insured, uninsured, or unable to insure their land. In reconsideration of the offers to be made, such anomalies may need to be justified in accordance with the purpose of the Act under which they are made.

[273] Matters such as these are for consideration, if ultimately relevant, when the chief executive reconsiders the offer to be made. Since the Court of Appeal

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284 Earthquake Commission Act, ss 2 (definition of "residential land") and 18.

285 *The Minister for Canterbury Earthquake Recovery v Fowler Developments Limited* [2013] NZCA 588, [2014] 2 NZLR 587 at [152].

286 At [152].

considered that the offers had not been "calibrated" by the need to consider the community recovery principle referred to in s 3, as they should have been, the entire circumstances must be reassessed.[287] The Act is concerned with the recovery of communities. It is not necessary to characterise the appellants as comprising a community to make their circumstances relevant. I agree with Glazebrook J that communities are made up of individuals. The Act is concerned with the recovery of the people whose communities have been shattered by the earthquakes and by the necessary dislocation they have entailed, and their reintegration into communities. The area-wide solutions promoted by the Government require all those within an affected area to be treated as members of that community and the subject of consideration in achieving the purposes of the Act.

[274] These are some of the circumstances relevant. No doubt there are others. The Court of Appeal said that "the mere fact" that some different basis of offer could be made was not reviewable error and might be justified.[288] That seems to me to be undoubtedly correct. To what extent difference can be justified remains something for assessment in the context of proper consideration under ss 10 and 3. In that assessment, it may still be reasonable to draw some distinction between those who were insured and those in respect of whom the Crown will obtain no off-setting recovery. Dismissing the appeal on this ground is simply to leave this matter, as with other matters, open for consideration if it turns out reasonably to bear on the decision.

(2) The lawfulness of the establishment of the red zone

[275] The second question on which leave was given concerned the lawful basis of establishment of the red zone. This arose out of the appellants' challenge to the June 2011 decision as substratum to the September 2012 offer. I have considerable sympathy with Panckhurst J's view that, in substance, the Government's decisions as to the zoning of earthquake affected areas of Christchurch cannot be characterised simply as the dissemination of its opinion.[289] I have come to the view however that

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287 At [137]–[138].
288 At [150].
289 *Fowler Developments Ltd v Chief Executive of the Canterbury Earthquake Recovery Authority* [2013] NZHC 2173, [2014] 2 NZLR 54 at [60].

this question is one it is unnecessary to resolve in the context of the use of powers to purchase without compulsion under s 53. Challenges to the validity of use of other powers under the Act or reliance on the red zone establishment to justify the running down of infrastructure or essential services could well make it necessary to decide in another case the status of the Government decisions of June 2011 and their lawfulness in the absence of a Recovery Strategy or Plan.

[276] The scheme of the Act may mean that the coercive powers under the Act, including to modify the obligations of local authorities and providers of essential services, can be exercised only after prior adoption of a Recovery Strategy or (if time does not permit) a Recovery Plan. In addition, as already suggested, it may be that the absence of a Recovery Strategy or Plan is a circumstance to be taken into account under ss 10 and 3 when reconsidering the offer to be made under s 53. But I am of the view that the scheme of the Act does not compel the adoption of a Recovery Strategy or Recovery Plan before exercise of the power to purchase on behalf of the Crown under s 53. And I consider that neither the question of the legal effect (if any) of the red zone nor the subsequent questions as to the source of any power to accomplish it is material to the disposition of the present appeal. It is necessary to explain why.

[277] The power under s 53 to purchase land where such purchase is consistent with the purposes of the Act is not directly linked to the adoption of a Recovery Strategy and the provisions for Plans, directions, and orders which affect rights of land use. The text of the Act does not make recourse to s 53 dependent on a Recovery Strategy or Plan. The structure of the Act places the sections dealing with the Recovery Strategy and Recovery Plans within subpart 3 of the Act which deals with "Development and implementation of planning instruments". That subpart also deals with the consequences of the Recovery Strategy and Plans for Resource Management Act instruments and consents, and contains s 27 which empowers the Minister to intervene in local government and other matters concerning land use.

[278] I do not think, however, that either the absence of explicit reference to the Recovery Strategy in connection with the power to purchase land or the location of s 53 in subpart 4 ("Further provisions") under the subheading "Provisions relating to

real or personal property" could be determinative. The overall scheme and purpose of the Act is to coordinate response to the earthquakes. Section 3 emphasises at the outset that the purposes of the Act are to ensure community response as well as recovery. It stresses the enabling of community participation in the planning of the recovery. The scheme of the Act is that the "overarching" strategy provided by a Recovery Strategy and developed through Recovery Plans, adopted after community input, is central to the coordinated and ordered response enabled by the Act. The Strategy is the principal mechanism for ensuring community participation.

[279] Does the scheme of the Act suggest that the powers of purchase under s 53 can be used only under a framework of Recovery Strategy and Plans? An interpretation that the Crown cannot treat for purchase of land from individual owners except under Plans which have in themselves significant legal impacts on property use imposes a substantial limitation on the power under s 53, which in its own terms is constrained only by s 10. The context is a voluntary purchase (the use of the compulsory powers of acquisition may well be different). None of the land use and regulatory effects provided for as a consequence of the adoption of a Recovery Strategy or Plan attaches to acquisition of ownership interests. There may be a number of reasons why waiting for the development of a Recovery Strategy or Plans is both unnecessary and undesirable if the chief executive on behalf of the Crown and after taking into account the purposes of recovery and expedition in s 3 has the opportunity to make purchases which further the policies of the Act – as the offers made in June 2011 did in enabling those who accepted them to move on.

[280] The fact the offers were made for all properties within a particular area and under a government policy to encourage clearance and Crown ownership has however caused me considerable pause. In agreement with Glazebrook J, I think the characterisation in the Crown submissions of the decisions of June 2011 as the provision of information only is inadequate description. The decisions gave signals to insurers and property owners which they were expected to use in determining how to proceed. They were expressed in terms that suggested rebuilding could not occur within the red zone. Against a background of legislative powers to compel the outcomes signalled (compulsory powers which were specifically mentioned in the information provided with the offers), the decisions indicated that those within the

green zone could proceed to rebuild and deal with their insurers on that basis. It indicated that rehabilitation and rebuilding were not appropriate in the red zone. It strains credulity to think that Councils and insurers would not be expected to act on the message, even though no direct compulsion was adopted.

[281] Although there had been no intervention to prohibit building, the rebuilding after the earthquakes was effectively stopped in fact while announcements based on the land damage and remediation findings commissioned by the Government were being awaited. In addition, the Department of Building and Housing was known to be working on new building guidelines for Christchurch. Although notionally building consents could have been granted, the Council was not in fact at the time granting such consents and did not in fact do so for the red zone after the announcements of June 2011.[290] When the Department of Building and Housing provided engineering guidelines for repair and rebuilding of houses in July 2011, they applied only to the green zones.

[282] Counsel for the respondents suggested at the hearing that the building consent regime was not affected by the June 2011 offers and that "[t]he reason that insurance claims could be settled more promptly and insurance renewed in the green zone was because of the factual reassurance provided by the announcement that, based on the best available engineering evidence, there were no area-wide land issues". That may be formally correct although in practice those in the red zone who wished to rebuild were left in limbo, unable to obtain building consents or insurance.

[283] Again it strains credulity to think that the Government announcements made in June 2011 did not contribute to that state and were simply the provision of information which left those affected free to pursue their own ends based on it. This was formally adopted and announced Government policy which the Minister had the power to enforce if encouragement proved inadequate. Such enforcement could be through exercise of the powers conferred under s 27 to suspend, revoke or amend a range of controls under the Resource Management Act or through adoption of a

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[290] Counsel for the respondents confirmed as much to the Court, saying that the Council had "dragged its feet" for some time but that, in his understanding, some consents had been more recently granted and, if they had not, the Council could be compelled to grant consents through mandamus.

Recovery Strategy or Recovery Plan.

[284] That the announcements of June 2011 were not simply the provision of information but were part of an overall Government policy for Christchurch is underscored by the indication in the June 2011 Cabinet paper that territorial authorities would be expected to discuss proposals for repair and maintenance of infrastructure and the acceptance of the need for government intervention through making the offers to achieve clearance, rather than leaving recovery in the red zone to be a matter to be negotiated between property owners, insurers, and Councils on the basis of the opinions provided.[291]

[285] The task of identifying where rebuilding could occur was envisaged by the Act to be the purpose of a Recovery Strategy and Plans. Section 11(3) made it clear that the Recovery Strategy would address "the areas where rebuilding or other redevelopment may or may not occur" and sequencing of rebuilding and redevelopment and location of infrastructure and the possible sequencing of repairs and reconstruction. To the extent that the decisions made in June 2011 in fact accomplished the establishment of such areas and the location of infrastructure and set priorities for rebuilding and repair, the opportunity for community participation in the critical decisions was overtaken.

[286] Such considerations may well be fatal to the exercise of other powers under the Act. It may be, for example, that the powers conferred on the Minister under s 27 could not be lawfully exercised without prior adoption of a Recovery Strategy or at the very least the adoption of a Recovery Plan (which could be on a directed truncated procedure, while subject to later adjustment to conform with a Recovery Strategy subsequently adopted).[292] In the case of a voluntary sale and purchase, however, I think it is open to the chief executive to adopt the criteria on which such offers are made, in compliance with s 10 but without there being in place an overarching Recovery Strategy or Recovery Plan adopted under the Act. As already indicated, compliance with s 10 may require some consideration of the consequences and the absence of opportunity to have them addressed in a Recovery Strategy and

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[291] Memorandum for Cabinet "Land Damage from the Canterbury Earthquakes" (24 June 2011) at [50]–[52].

[292] Canterbury Earthquake Recovery Act, s 18.

Recovery Plans.

[287] The Act sets up a framework under which the effort of responding to the damage caused to property and people by the earthquakes can be coordinated. The offers of purchase might well have been made under an overarching Recovery Strategy adopted by the processes under the Act. But that sequence was not provided for explicitly in the legislation. I consider it too great a stretch to say that the use of s 53 requires prior adoption of a Recovery Strategy or Plan. Quite apart from the delay that may have been entailed, the consequences for land use and regulation of such plans would have impacted on existing use rights and may well have had consequences for insurance obligations which would have been difficult to predict with confidence. Adherence to the scheme and purpose of the Act in exercise of powers under s 53 is I think sufficiently ensured by s 10.

[288] I consider that the chief executive was entitled to identify the properties in respect of which offers were to be made on the basis of the expert advice accepted by the Government as to the areas likely to be unsuitable for reinstatement within the medium term. In the absence of the adoption of a Recovery Strategy or Recovery Plans, that identification had no legal consequence for the status of the land and its use. It may well be that the purpose and scheme of the Act means that powers of the Minister or chief executive under it which alter rights and obligations cannot lawfully be used without first adopting a Recovery Strategy or Recovery Plan. But I do not consider that is the case with s 53. I would therefore decline to make the declaration sought by the appellants and would dismiss their appeal on the second ground also.

WILLIAM YOUNG J

Preliminaries

[289] In the course of these reasons, I will refer to the decision taken in June 2011 as "the June 2011 decision", the offers made pursuant to it as "the June 2011 offers", the decision made in May 2012 as to the owners of houses under construction and not-for-profit organisations as "the May 2012 decision", the offers made pursuant to it as "the June 2012 offers", the decision as to the offers to be made to inter alia,

uninsured owners as "the September 2012 decision" and the offers made pursuant to it as "the September 2012 offers". I will generally, for ease of reference, refer to decision-makers as the government except where it is necessary to focus on a particular statutory power and its exercise by an identified person. References to "the Minister" and "chief executive" are to the Hon Gerry Brownlee (as the Minister for Canterbury Earthquake Recovery) and Mr Roger Sutton (who was at all material times the chief executive of the Canterbury Earthquake Recovery Authority (CERA)). In discussing the June 2011 decision I will generally refer to the 24 June 2011 memorandum from the Minister to the Cabinet as "the decision paper".

[290] Those who have fire and general insurance in relation to their homes also, automatically, have insurance with the Earthquake Commission (EQC) which extends to land damage. Land is otherwise not able to insured (in that separate cover for land is not offered by insurers). References in these reasons to uninsured owners encompass the owners of both uninsured improved residential properties and vacant land.

[291] Under the June 2011 decision, the only offers made were to the owners of insured residential properties. The detail of those offers, based on 2007 rating valuations is discussed in the reasons of the majority. No decision was made in June 2011 as to the offers to be made in respect of other classes of property. These comprised (a) uninsured residential properties, (b) vacant land, (c) residential properties with houses under construction (d) commercial and industrial properties, (e) properties owned by not-for-profit organisations and (f) leasehold properties.

[292] Pursuant to the May 2012 decision, the government, in June 2012, extended the offers made in June 2011 to the owners of insured residential red zone properties to:

(a) owners of buildings under construction where the owners had building/construction insurance (adjusted to allow for the stage of construction reached); and

(b) not-for-profit organisations which owned insured non-residential properties.

[293] These offers thus provided for payment of land value even though neither category of owner had insurance through EQC in respect of land damage.

[294] The authors of the paper commented, rather forlornly as it has turned out, that:[293]

> We do not consider this will create a precedent to extend a Crown offer to any other remaining property categories in the red zones.

[295] This view seems to have been based primarily on the following considerations:

(a) the recipients of the offers had been as fully insured as possible; and

(b) the not-for-profit organisations provided what were described as "community support/development functions".[294]

[296] Other factors which are discussed in the decision paper and may have been seen as material were:

(a) "Zoning decisions [presumably a reference to the depopulation of the residential red zone] have serious implications for not-for-profit organisations … in terms of disruption of their activities and services".[295]

(b) There were only 11 properties with houses under construction in the residential red zone. After allowing for insurance recoveries but also transaction expenses the estimated net cost of this part of the exercise was $5,370,000.

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293 Cabinet Paper "Red zone residential properties under construction and non-residential properties owned by not-for-profit organisations" (signed by the Minister on 25 May 2012) at [5].

294 At 2.

295 At [33].

(c) There were only seven properties covered by the offers to not-for-profit organisations and the estimated net cost of the exercise (after excluding transaction expenses but allowing for insurance recoveries) was just over $6 million.

[297] A further paper, in the form of a table, was prepared in early August 2012 addressing options in respect of inter alia, uninsured residential land and bare land. In each case the table noted that the option preferred by CERA was an offer to buy at 50 per cent of land value as assessed in the 2007 rating valuations. The recommendations were carried through into a 30 August 2012 Cabinet paper prepared by CERA which was adopted so as to become the September 2012 decision.

[298] The minute of the Cabinet's decision:[296]

> 5. note[d] there are good reasons for uninsured properties (including vacant land) to not receive an offer on the same terms as insured properties:
>
> 5.1 it would compensate for uninsured damage;
>
> 5.2 it would be unfair to other red zone property owners who have been paying insurance premiums;
>
> 5.3 it could create a moral hazard in that the incentives to insure in the future are potentially eroded.

[299] The other detail of September 2012 decision is of limited moment for present purposes save to note that the owners of insured commercial property received offers which were similar to the June 2011 offers save that the offers were for 50 per cent and not 100 per cent of land value.

[300] The current position is that the government has offered to purchase a total of 6,991 properties in the residential red zone (excluding the Port Hills). As of 28 June 2013, offers in respect of only 130 had not been accepted. Of the offers made, 193 were for 50 per cent of land value as assessed in the 2007 rating valuation

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[296] Cabinet Business Committee (Minute of Decision) "Canterbury Earthquake: Red Zone Purchase Offers for Residential Leasehold, Vacant, Uninsured, and Commercial/Industrial Properties" (3 September 2012) CBC Min (12) 6/3.

and 61 of these offers have not been accepted.[297] Of these offers, 46 were to members of Quake Outcasts. I am not sure whether Fowler Developments Ltd (which owned 11 sections and is not part of the Quake Outcasts group) accounts for one or 11 of the non-accepted offers. Either way, it appears that most of those who have not accepted the offers at 50 per cent of land value are parties to the present appeals.[298]

[301] The appellants are not seeking the setting aside of the June 2011 decision. Indeed, they could hardly do so given that their expectation of purchase offers is substantially grounded in that decision and its subsequent implementation. The only issue in this appeal of practical moment is the basis upon which the chief executive should make the further offers to the appellants which are required as a result of the Court of Appeal judgment.[299] Particularly in issue is whether the uninsured status of the appellants is material to the offers to be made. Given this, it is legitimate to question why so much attention has been addressed to the validity (or otherwise) of the June 2011 decision.

[302] An indication of the reasons why the Quake Outcasts challenged the June 2011 decision is provided in a letter before action of 13 February 2013 sent by their solicitors to CERA:

> The group [being the Quake Outcasts] considers that your decision is susceptible to successful legal challenge on a number of grounds, as well as significant political embarrassment over the next two years. For example, the group considers that even the Government's declarations of the "red zones" are unlawful, as such declarations have been made outside the statutory regime set out in the CERA Act, and appear to have been imposed without any consideration of the requirements of that Act. Each of the group's members proposes to challenge every step of your process at every step of the way should it continue.
>
> However, the Quake Outcasts would much prefer to discuss with you the possibilities of a better offer that meets both your needs and those of the group members. …

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297 These figures come from an affidavit of the chief executive sworn on 1 July 2013.

298 I note that some of the appellants have entered into interim settlements with the government under which they have been paid 50 per cent of land value but on what is essentially a without prejudice basis. I assume that these transactions are not included in the accepted offers to which I have referred.

299 *Minister for Canterbury Earthquake Recovery v Fowler Developments Ltd* [2013] NZCA 588, [2014] 2 NZLR 587 (O'Regan P, Ellen France and Stevens JJ).

[303] This rather suggests that the initial challenge to the June 2011 decision was in the nature of a negotiating tactic.

[304] The arguments for the Quake Outcasts proceeded in part at least on the basis that the procedural infelicities (as they see them) associated with the June 2011 decision enhance their entitlements (as they see them) as to what the government should offer them for their properties. As will become apparent, I do not accept that there were any such procedural infelicities. But, more significantly, if there were such infelicities, I do not see them as material as to the offers to be made to uninsured owners. I therefore see the validity of the June 2011 decision as a red-herring and I think it would have been better if we had chosen not to engage with it.

[305] In subsequent sections of this judgment I will address:

(a) the scheme of the legislation;

(b) the challenge to the June 2011 decision; and

(c) the basis upon which offers may be made to the appellants.

The scheme of the legislation

[306] The structure of the Act is relevantly as follows.

[307] The purposes of the Act are specified in section 3:

> **3 Purposes**
>
> The purposes of this Act are—
>
> (a) to provide appropriate measures to ensure that greater Christchurch and the councils and their communities respond to, and recover from, the impacts of the Canterbury earthquakes:
>
> (b) to enable community participation in the planning of the recovery of affected communities without impeding a focused, timely, and expedited recovery:
>
> (c) to provide for the Minister and CERA to ensure that recovery:
>
> (d) to enable a focused, timely, and expedited recovery:

(e) to enable information to be gathered about any land, structure, or infrastructure affected by the Canterbury earthquakes:

(f) to facilitate, co-ordinate, and direct the planning, rebuilding, and recovery of affected communities, including the repair and rebuilding of land, infrastructure, and other property:

(g) to restore the social, economic, cultural, and environmental well-being of greater Christchurch communities:

(h) to provide adequate statutory power for the purposes stated in paragraphs (a) to (g):

…

[308] Sections 6 and 7 provided for the establishment of a community forum and a cross-party parliamentary forum. The purpose of each body is to provide the Minister "with information or advice in relation to the operation of [the] Act."

[309] The functions of the Minister and the chief executive of CERA are set out in ss 8 and 9. These are specified by reference to the powers conferred on the Minister and chief executive by later sections of the Act. There are no general provisions in these sections which render the exercise of such powers subject to any compliance with any other instruments (in particular the Recovery Strategy or a Recovery Plan) which are provided for in the Act.

[310] Section 10(1) and (2) provide:

10 Powers to be exercised for purposes of this Act

(1) The Minister and the chief executive must ensure that when they each exercise or claim their powers, rights, and privileges under this Act they do so in accordance with the purposes of the Act.

(2) The Minister and the chief executive may each exercise or claim a power, right, or privilege under this Act where he or she reasonably considers it necessary.

…

[311] This is the only section in the Act which imposes general limitations on the exercise by the Minister and chief executive of their statutory powers. Such powers must only be exercised:

(a) "in accordance with the purposes of the Act"; and

(b) where the Minister or chief executive "reasonably considers [such exercise] necessary".

[312] There is no suggestion in s 10 that the exercise of powers under the Act is subject to the development of the Recovery Strategy or a Recovery Plan.

[313] The development and effect of the Recovery Strategy are provided for in ss 11–15. What is contemplated is set out in s 11(3):

> The Recovery Strategy is an overarching, long-term strategy for the reconstruction, rebuilding, and recovery of greater Christchurch, and may (without limitation) include provisions to address—
>
> (a) the areas where rebuilding or other redevelopment may or may not occur, and the possible sequencing of rebuilding or other redevelopment:
>
> (b) the location of existing and future infrastructure and the possible sequencing of repairs, rebuilding, and reconstruction:
>
> (c) the nature of the Recovery Plans that may need to be developed and the relationship between the plans:
>
> (d) any additional matters to be addressed in particular Recovery Plans, including who should lead the development of the plans.

[314] The Recovery Strategy is to be developed by the chief executive, in consultation with local authorities, Te Rūnanga o Ngāi Tahu and other bodies as the Minister considers appropriate.[300] A draft Recovery Strategy is required to be notified and there is also a requirement for public hearings.[301] The final Recovery Strategy (subject to the possibility of future change under s 14) is approved by the Governor-General by Order in Council on the recommendation of the Minister.[302]

[315] The effect of the Recovery Strategy is provided for by s 15:

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300 Canterbury Earthquake Recovery Act 2011, s 11(4).
301 Sections 12 and 13.
302 Section 11(2).

15 Effect of Recovery Strategy

(1) No RMA document or instrument referred to in section 26(2), including any amendment to the document or instrument, that applies to any area within greater Christchurch may be interpreted or applied in a way that is inconsistent with a Recovery Strategy.

(2) On and from the commencement of the approval of a Recovery Strategy, the Recovery Strategy—

(a) is to be read together with and forms part of the document or instrument; and

(b) prevails where there is any inconsistency between it and the document or instrument.

(3) No provision of the Recovery Strategy, as incorporated in an RMA document under subsection (2)(a), may be reviewed, changed, or varied under Schedule 1 of the Resource Management Act 1991.

[316] The documents referred to in s 26(2) of the Act are:

(a) annual plans, long-term plans, and triennial agreements under the Local Government Act 2002, except a funding impact statement in an annual plan or a long-term plan:

(b) regional land transport plans under the Land Transport Management Act 2003:

(c) the New Zealand Transport Agency's recommendations under section 18I of the Land Transport Management Act 2003:

(d) regional public transport plans adopted under section 119 of the Land Transport Management Act 2003 or section 9 of the Public Transport Management Act 2008:

(e) all or any of the following:

(i) general policies approved under section 17B of the Conservation Act 1987 and general policies approved under section 15A of the Reserves Act 1977:

(ii) conservation management strategies approved under section 17F of the Conservation Act 1987 and section 40A of the Reserves Act 1977:

(iii) conservation management plans approved under section 17G of the Conservation Act 1987 and conservation management plans approved under section 40B of the Reserves Act 1977:

(iv) management plans approved under section 41 of the Reserves Act 1977:

(v) conservation management plans approved under section 14E of the Wildlife Act 1953:

(vi) any other management plan for a reserve under any other enactment.

[317] Recovery Plans are provided for by ss 16–26.

[318] The Act requires a Recovery Plan to be developed for the whole or part of the central business district under the leadership of the Christchurch City Council.[303] In the case of other parts of greater Christchurch the Minister may direct the preparation of a Recovery Plan. This is pursuant to s 16:

> **16 Recovery Plans generally**
>
> (1) The Minister may direct 1 or more responsible entities to develop a Recovery Plan for all or part of greater Christchurch for his or her approval.
>
> (2) The direction must specify the matters to be dealt with by the Recovery Plan, which matters may include provision, on a site-specific or wider geographic basis within greater Christchurch, for—
>
> (a) any social, economic, cultural, or environmental matter:
>
> (b) any particular infrastructure, work, or activity.
>
> (3) A responsible entity may request that the Minister direct it to develop a Recovery Plan.
>
> (4) Where the Minister directs the development of a Recovery Plan, he or she must ensure that the direction is notified in the *Gazette* together with a list of all other Recovery Plans being developed or in force.

[319] "Responsible entity" is defined as meaning:[304]

> … the chief executive, a council, a council organisation, a department of the Public Service, an instrument of the Crown, a Crown entity, a requiring authority, or a network utility operator …

[320] As to the development of a Recovery Plan, ss 19 and 20 provide:

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303 Section 17.
304 Section 4.

19 Development of Recovery Plans

(1) The Minister may, subject to [section] … 20, determine how Recovery Plans are to be developed, including any requirements as to consultation or public hearings.

(2) In acting under subsection (1), the Minister must have regard to—

(a) the nature and scope of the Recovery Plan; and

(b) the needs of people affected by it; and

(c) the possible funding implications and the sources of funding; and

(d) the New Zealand Disability Strategy; and

(e) the need to act expeditiously; and

(f) the need to ensure that the Recovery Plan is consistent with other Recovery Plans.

(3) Neither the Minister nor any responsible entity has a duty under this Act to consult any person about the development of a Recovery Plan, except as provided under this section or in section … 20.

(4) Nothing in section 32 or Schedule 1 of the Resource Management Act 1991 applies to the development or consideration of a Recovery Plan.

20 Public notification of draft Recovery Plans

…

(2) The Minister must ensure that all … draft Recovery Plans [other than for the CBD] are publicly notified.

(3) The notification must—

(a) advise where the document can be viewed; and

(b) invite members of the public to make written comments on the document in the manner and by the date specified in the notice.

[321] Final decisions on a Recovery Plan are for the Minister.

[322] The sections dealing with Recovery Plans do not contain any explicit statement as to their purpose. Their effect, however, is provided for in ss 23–26. That effect is as follows:

(a) decisions made under the Resource Management Act 1991 must not be inconsistent with a Recovery Plan in any respects listed in s 23(1)(a);

(b) councils must amend planning instruments as may be required to give effect to a Recovery Plan (see s 24);

(c) section 88A(1A) of the Resource Management Act which deals with the consideration of resource consent applications where the rules change between application and hearing does not apply to any activity specified in a Recovery Plan; and

(d) the instruments specified in s 26 of the Act must not be inconsistent with a Recovery Plan.

[323] Under s 27, the Minister may, inter alia, (1) suspend, amend or revoke a range of instruments, including documents under the Resource Management Act, most of the instruments listed in s 26 and bylaws and (2) may suspend or cancel resource consents, existing use rights provided for in ss 10, 10A or 10B of the Resource Management Act and certificates of compliance under the Resource Management Act.

[324] Under ss 29–32, the chief executive has broad powers to collect and disseminate information.

[325] Section 48 confers on the Minister powers to direct any council or council organisation to take or stop taking any action. Under ss 49 and 50 the Minister may direct councils or council organisations to perform specified functions or exercise specified responsibilities, and, in default of compliance, the Minister may call-in and perform and exercise those functions and responsibilities.

[326] Section 53 provides for the chief executive, in the name of the Crown to purchase any land or personal property and ss 54–58 provide for compulsory acquisition with compensation rights provided for in ss 60–67.

[327] Under the Act compensation is available in respect of compulsorily acquired land and also in relation to the demolition of non-dangerous buildings (under s 40) or damage negligently caused to other property by the demolition of a building by the chief executive (under s 41). That aside, s 67 provides:

> Nothing in this Act … confers any right to compensation or is to be relied on in any proceedings as a basis for any claim to compensation.

The challenge to the June 2011 decision

The situation as it was just prior to the June 2011 decision

[328] There were major earthquakes on 4 September 2010, 26 December 2010, 22 February 2011 and 13 June 2011. More than 180 people lost their lives as a result of the February event and each earthquake caused substantial property damage. There were many other – in fact thousands – of earthquakes, a significant proportion of which were distinctly discernible and thus alarming for those living in and around Christchurch. As at June 2011, there was a substantial risk (assessed at 34 per cent) of a further major earthquake[305] in the next 12 months.[306] Many of the buildings in the city centre were damaged past the point of economic repair and the central business district was cordoned off. There had been huge infrastructural damage, particularly to roads and underground services. As well, in the aftermath of the February 2011 earthquake, it had become apparent that land damage in some areas was beyond the scope of sensible and economic remediation at least in the short to medium term. It was also recognised that in some instances, remediation could only be achieved satisfactorily if existing houses and other improvements were first removed.

[329] There were major difficulties over insurance. One insurer (Western Pacific) failed, another (AMI) was in effect taken over by the government and others stopped providing cover. It was important to maintain the confidence of the insurance industry so that cover would continue to be provided. The Earthquake Commission and insurers were overwhelmed by the number and complexity of claims and reluctant to commit to substantial expenditure on repairs and rebuilds while there

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[305] Between magnitudes 6.0 and 6.9.

[306] As it happened, on 23 December 2011, there was a further earthquake within this range.

was uncertainty as to the areas in which substantial remediation would be required. What was necessary was a mechanism for enabling residents and insurers to be able to plan with as much confidence as the circumstances (reinforced by government decisions and reassurance) permitted and thus for the rebuild of Christchurch to get underway.

[330] After the 22 February earthquake, work had commenced in earnest to identify areas in which repairs and rebuilding could sensibly begin at once and those which could not be remediated at reasonable cost due to land damage associated primarily with liquefaction and lateral spread (although risks of flood, cliff collapse, rock-fall and land-slippage were also material).

[331] The shape of the final June 2011 decision was reasonably well-defined by mid-June, but the earthquakes on 13 June 2011 – there were two significant earthquakes that day – emphasised the necessity for government action, and in particular for what was described as a "circuit-breaker".[307] On 20 June 2011, the Cabinet gave a group of senior Ministers authority to make decisions on Canterbury earthquake land damage and remediation issues with power to act until 27 June 2011. The perception at the time was that pressure of circumstances was such that the decision and resulting announcement could not be deferred for seven days (that is until after the next scheduled Cabinet meeting on 27 June 2011).

The June 2011 decision

[332] The critical decision was made by the group of senior ministers on 22 June 2011 and this was followed by public announcements made by the Prime Minister and Minister on 23 June 2011. The decisions were reported to the Cabinet in the decision paper of 24 June 2011 to which I have referred.

[333] The key features of the June 2011 decision were:

(a) The adoption of a process for categorising properties in terms of whether remediation was economic.

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[307] Memorandum for Cabinet "Land Damage from the Canterbury Earthquakes" (24 June 2011) at [19].

(b) The application of that process to identify zones in (or in respect of) which (i) repairs and rebuilds could proceed with confidence (the green zone); (ii) such repairs and rebuilds should not proceed in the short to medium term because the cost of remediating the land was uneconomic (the residential red zone); and (iii) it was not yet known whether such repairs and rebuilds would be economic (the orange and white zones).

(c) The adoption of a policy as to the offers to be made to the owners of insured residential properties in the residential red zone.

(d) Deferral of decisions as to offers to be made in respect of other categories of property.

(e) The absence of formal compulsion, but the application of some pressure, to accept offers.

[334] I should briefly discuss the last point. Because of the underlying ground conditions, repairs and rebuilding were impracticable for most home owners. It follows that if the June 2011 decision had not been made, substantial depopulation of the residential red zone was inevitable (as owners settled with their insurers and moved elsewhere). Such depopulation would diminish the viability of continuing to supplying residential services (such as electricity and water) and maintenance of infrastructure (such as roads). This in turn would put pressure on remaining residents to leave. From the point of view of the government, it was sensible for such residents to do so. As well, the future ability of the government to remediate or otherwise deal with or use the land will be enhanced if it has total ownership. It is clear that the government's preference and ultimate purpose were for all residential red zone residents to move out. That this is so is apparent from some passages in the June 2011 decision paper. It is also apparent from the information which accompanied the offers to the effect that:

(a) the City Council would not be installing new services in the residential red zone;

(b) the Council and other utility service providers might conclude that the further provision of services was impracticable;

(c) insurers might cancel or not renew insurance policies; and

(d) the government had power to compulsorily acquire land at its then market value and if such power was exercised in the future, that value might be substantially less than the Crown offer.

[335] Such advice was in a sense a statement of the obvious and presumably seen as such by those who provided it. But it was understandably seen by offerees as putting them under pressure to accept the offers. Perceptions of pressure were, however, of limited moment as the June 2011 offers were sufficiently generous as to make acceptance an obvious course of action.

[336] The estimated gross cost of the June 2011 offers was $1.7 billion but, after allowing for estimated offsetting insurance recoveries, the net cost was estimated to be in the range of $485–635 million. As it turned out, rather more owners than expected accepted the land value only option. Although I do not have precise figures, the chief executive, in his affidavits, has estimated that two thirds of the gross purchase costs will be offset by insurance recoveries. This assessment allows nothing for any residual value the land might have to the government.

The legal foundations of the June 2011 decision

[337] The application for review in relation to the June 2011 decision proceeds on the basis that the process followed did not conform to that required, implicitly, by the Act. Mr Goddard met this argument by contending that the June 2011 decision was made independently of the Act and under the common law powers of the Crown which were not, in this instance, curtailed or limited by the Act. On this basis, he argued that challenge to the June 2011 decision was misconceived.

[338] The June 2011 decision was made by a committee of senior Ministers, and did not directly involve the exercise of any powers provided for in the Act. The status of the land under the Resource Management Act and the City Plan was not

affected. The only legal effect of the June 2011 decision was that it constituted an appropriation under the Public Finance Act 1989 authorising the funding for the making of the proposed offers. Although there is a statutory power under the Act to acquire property, the Crown has a common law power to do so anyway. Property owners were not required to accept the offers and if they did not, they remained legally entitled to continue to live on their properties. The Prime Minister and Minister did not require, and were not exercising, statutory power when they made the public announcement by which the June 2011 decision was first implemented.

[339] Because the powers conferred by the Act were not invoked, the June 2011 decision could have been taken in the absence of the Act. Further Mr Goddard maintained that nothing in the Act is suggestive of a purpose of constraining the ability of the government to respond to the earthquakes. Rather, it confers specific powers which are subject to some restrictions. Mr Goddard's position was that the Act should be read as conferring on the government powers it did not already have rather than as restricting powers which it already had.

[340] I have some sympathy with Mr Goddard's argument. While I am prepared to accept that there some respects in which the Act covers the ground,[308] I do not accept that any governmental response to the earthquakes must occur within the framework provided by the Act. And I likewise do not accept that the availability of a mechanism under the Act for achieving a particular result necessarily precludes the use of an extra-statutory mechanism aimed at achieving the same result. For instance, I do not see the power under the Act for the chief executive to disseminate information precluded the Prime Minister and Minister making public announcements on 23 June 2011. As well, I agree with Mr Goddard that the June 2011 decision could have been implemented if the Act had never been passed. I nonetheless am not able to accept his argument in its entirety.

[341] As noted, the decision of June 2011 amounted to an appropriation which provided the funding necessary to back the offers which were to be made to insured residential property owners. It is apparent from the decision paper that the June 2011 decision would be implemented by the Minister and CERA. The legal as well as the

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[308] See below at [354].

practical effect of the June 2011 decision was that the chief executive would make the offers contemplated by the June 2011 decision. This is because, under s 32 of the State Sector Act 1988[309] the chief executive was responsible to the Minister for:

> the carrying out of the functions and duties of the Department (including those imposed by Act or by the policies of the Government)

[342] Given that the chief executive was to make the offers and had power to do so under s 53 of the Act, it seems reasonably clear that the June 2011 decision envisaged the exercise of that power.

[343] My conclusion that the June 2011 decision was to be implemented using powers provided by the Act is reinforced by the wider context in which the decision was made. The Act provided for powers which could have been, but were not, exercised so as to provide regulatory reinforcement of the June 2011 decision. That decision can thus be seen as in effect a decision not to invoke those regulatory options. Future resort to those regulatory options was referred to somewhat obliquely in the decision paper. For instance, the decision paper noted:[310]

> As a result of these offers there is unlikely to be any justification in the near to medium term for the infrastructure and services in these areas to receive any more than temporary repairs. The relevant Councils will be asked to discuss any proposed maintenance and repair plans, for the infrastructure in these areas, or any proposed regulatory interventions for the areas.

[344] In similar vein, the paper noted that in the residential red zone:[311]

> rebuilding *may not occur* in the short-to-medium term …

[345] Producing a result in which rebuilding "may not occur" would require regulatory action.

[346] As is apparent, the respondents do not challenge the conclusion of the Court of Appeal that the offers made pursuant to the September 2012 decision be

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309 Section 32 was substantially amended by the State Sector Amendment Act 2013. The relevant subsection now says: "the performance of the functions and duties and the exercise of the powers of the chief executive or of the department or departmental agency (whether imposed by any enactment or by the policies of the Government)".

310 Memorandum for Cabinet "Land Damage from the Canterbury Earthquakes" (24 June 2011) at [52].

311 At [10](c) (emphasis added).

reconsidered. This involves an acceptance that those offers were made pursuant to the Act and are reviewable by reference to the general provisions of that Act. I cannot see any basis for concluding that those offers are reviewable if the June 2011 offers and decision itself are not also reviewable by reference to arguments which are grounded in the Act.

The shifting grounds of review

[347] The basis upon which the appellants succeeded in the High Court in relation to the June 2011 decision was that it amounted to a re-zoning of the affected land, an exercise which Panckhurst J said could only take place pursuant to s 27 of the Act.[312] Panckhurst J held that this section occupied the relevant ground.

[348] In the Court of Appeal, the case for the appellants seems to have been advanced more generally on the basis that the substance of the June 2011 decision could only be implemented via the Recovery Strategy, a Recovery Plan or s 27.

Regulatory mechanisms available under the Act

[349] If the government had wished to compel the depopulation of the residential red zone, it could have done so by the exercise of regulatory powers conferred by the Act. This would have involved changing the rules in the City Plan so that residential, commercial and industrial uses were no longer permitted in the residential red zone. Such change could have been effected through the Recovery Strategy – which would over-rule anything to the contrary in the City Plan, under a Recovery Plan, or by the exercise of the power conferred by s 27(1)(a). If this option was chosen, it would also have been necessary to cancel existing use rights. This could have been achieved under s 27(2). As well, I think that it would have been open to the Minister to give directions to the City Council under s 48 not to grant building consents and as to the provision (or non-provision) of utility services in the designated areas.

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[312] *Fowler Developments Ltd v Chief Executive of the Canterbury Earthquake Recovery Authority* [2013] NZHC 2173, [2014] 2 NZLR 54 (Panckhurst J) at [62] and [70].

[350] The issues which confronted the government in June 2011 were too pressing to await the finalisation of the Recovery Strategy. Before us, there was no real attempt to assert that s 27 occupied the ground (presumably because the exercise of s 27 powers is not subject to consultation). So the primary focus of the appellants' argument was that the government should have used the Recovery Plan procedure.

The key propositions advanced by the appellants as to why the Recovery Plan procedure ought to have been adopted

[351] There are two distinct bases upon which it is said that the Recovery Plan option should have been pursued:

(a) the June 2011 decision was, in effect, a zoning decision with substantial de facto effect on the City Plan and that for this reason resort to the Recovery Plan option was mandatory because that process (along with s 27) should be treated as impliedly excluding any ability of the government to bring about that result by any other means; and

(b) in any event the subject matter of the June 2011 decision (and particularly as to the offers to be made to property owners) was of such magnitude that it should have been addressed by the Recovery Plan and the associated consultative process.

Was the June 2011 decision a de facto rezoning of the land which could only be effected under a Recovery Plan or a s 27 determination?

[352] The government did not wish to interfere with the City Plan zoning of the land or take other regulatory steps to force depopulation of, and preclude rebuilding within, the residential zone. Such regulatory action would have had unpredictable effects on the resolution of then-current insurance claims. If such effects were to the prejudice of insurers, it would have reduced their willingness to continue to provide cover in Christchurch. As well, it is quite possible that in the medium to long term, some or all of the land will be remediated and used again for residential purposes.

[353] Given that the government was not seeking to challenge the status under the Resource Management Act of the red zone land, there was no occasion to resort to s 27, a proposition with which the majority appear to agree (see [133] above). I think the same is true of the Recovery Plan process. The effects of a Recovery Plan are stipulated in ss 23–26 of the Act. In its June 2011 decision, the government was not seeking to bring about any such effects. So even on a view of the Act which is more restrictive than I favour, the Recovery Plan process, when assessed by reference to the consequences of such a Plan provided for in the Act, cannot have been intended to exclude powers which were otherwise available to the government.

Should the issue of what offers should be made nonetheless have been addressed by the Recovery Plan process?

[354] On this aspect of the case, the reasoning of the majority proceeds on the premise that the June 2011 decision was one which, if time had permitted could, and should only, have been made pursuant to a Recovery Strategy. I agree that if time had permitted, the Recovery Strategy process could have been used. I am also inclined to accept that in that context – in other words, with time permitting the Recovery Strategy process to be followed – the June 2011 decision could only have been made via a Recovery Strategy.[313] It is, however, common ground that the pressure of events was such that there was insufficient time to go through the Recovery Strategy process.

[355] The critical aspect of the majority's reasoning that I disagree with is the conclusion that because the Recovery Strategy process could not be followed, it was mandatory to proceed by way of a Recovery Plan. The Act does not explicitly impose a requirement along the lines proposed by the majority. And contrary to the view of the majority (at [126]–[127]), I do not see such a requirement as implicit in s 18(2) which provides that Recovery Plans can precede the Recovery Strategy. There is, likewise, nothing in the provisions of the Act which are specific to Recovery Plans which suggest that such plans were intended to cover the same

[313] It is clear that there must be a Recovery Strategy, see s 8(b) and (c) and s 11(1). And the subject matter of the June 2011 decision is well within the scope of what was intended and, I would accept, required, by s 11(3)(a) and (b).

ground as the Recovery Strategy or the subject matter of the June 2011 decision. This last point requires a little explanation.

[356] The matters which are to be addressed in a Recovery Plan are to be determined by the Minister and may include those identified in s 16(2). The Act does not otherwise explicitly identify the purpose or intended scope of a Recovery Plan. The consequences of a Recovery Plan are confined to the administration of the Resource Management Act (under ss 23–25) and the instruments identified in s 26. From this, it seems to me to be obvious that the purpose of a Recovery Plan is to ensure that the administration of the Resource Management Act and the instruments identified in s 26 operate consistently with recovery planning exercises over which the Minister is ultimately responsible. That this is so is consistent with the CBD recovery plan being required to be developed under the leadership of the City Council and for the chief executive to be only one of the "responsible entities" who can be required to develop a Recovery Plan otherwise than for the CBD.[314]

[357] There is nothing in the Act to suggest that Recovery Plans are intended to provide constraints on the Minister and chief executive (otherwise than perhaps as a consequence of their s 23–26 effects). Their functions are provided for in ss 8 and 9, neither of which impose any obligation to act consistently with, or even to have regard to, Recovery Plans. So although s 23(1) requires decision-makers under the Resource Management Act not to act inconsistently with a Recovery Plan, there is no equivalent provision in respect of the Minister and chief executive.

[358] Powers to acquire land are set out in the Act. I do not see it as within the plausible scope of a Recovery Plan to modify those provisions let alone impose an obligation to acquire property on specified terms, particularly as there is nothing in the Act to suggest that funding decisions of the government are intended to be the subject of a Recovery Plan.

A conclusion as to the June 2011 decision

[359] I consider that the challenge to this decision should be dismissed.

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[314] Section 16(1).

The basis upon which offers may be made to the appellants

An overview

[360] Primarily in issue on this aspect of the case is whether it was open to the government to take into account the insurance status of the offerees. Such status affects the net cost (after insurance recoveries), and not just the gross cost, of its offers. As well, it affects the value of the economic interests which the offerees are required to surrender. It might be thought to follow that insurance status of the offerees is therefore highly material to the structure and amount of the offers to be made, a point which I will develop.

[361] In other sections of this part of my reasons I will address particular issues raised by the majority. I consider that symmetry considerations are, at most, material only in relation to the offers to be made in relation to uninsured bare land and even in respect of such land, not necessarily controlling. On the question whether the government should structure offers so as to cover losses which were insurable but not insured, I see arguments based on moral hazard (construed broadly) as highly relevant. I am sceptical as to the extent to which the June 2011 decision, as opposed to the earthquakes, detrimentally affected the appellants. I am also of the view that possible infelicities in the process adopted by the government are not material to the offers which are to be made (save perhaps in relation to an allowance for interest). And for the reasons which I will explain, I do not see the appellants as a "community" for the purposes of the Act.

The relevance of the insurance status of the offerees

[362] The June 2011 offers were made on a basis which presupposed that there would be very substantial insurance recoveries. The assessment was that the net cost of the exercise would be around one third of the gross cost (with nothing allowed for the value of the land acquired). The associated exercises were reasonably finely tuned as there was scope for downwards adjustment in respect of property owners who were under-insured.

[363] In the case of the offers in question, there being no off-setting recoveries, the net cost of the exercise was exactly the same as the gross cost (again allowing nothing for the value of the land acquired).

[364] The offers in respect of insured properties were attractive, particularly as to land value and the choice offered to pursue recovery against insurers for property damage. It follows that some, and perhaps many of the recipients were better off under the offers than they would have been if left to pursue claims against EQC and the insurers and with the residual value of their properties. It is not easy to get a handle on the extent to which this is so but I assume it correlates roughly to the net cost figures which I have identified. On this basis it might be thought that if the residual value of the land is ignored, insured owners as a class, received around 50 per cent more in terms of cash than would have been the case had they been confined to their remedies against EQC and insurers. Allowing something for the residual value of the land, the benefit to insured owners, as a class, would, on this basis, have been in the vicinity of say 45 per cent more than the economic value of what they surrendered.

[365] There is very limited evidence as to the post-earthquake value of land in the residential red zone prior to the June 2011 decision. One estimate was that it may have been worth ten per cent of the 2007 land value assessments. If this is right, the September 2012 offers were approximately 500 per cent of the value of what was required to be surrendered.

[366] The figures on which these calculations are based are rough to say the least. I accept as well that the calculations are broad brush and are not personalised to particular owners and properties. Further, they represent an economic analysis of transactions which, from the point of view of the government, were not primarily economic in purpose. To put this another way, the government was not setting out to ensure that it received full value for the money which it was spending. On the other hand, to ensure acceptance, the offers had to bear a favourable relationship to what the offerees were surrendering.

[367] For those reasons, the uninsured status of the land to be acquired under the September 2012 offers, and thus the absence of any insurance payment offsets and the very limited value of the rights the owners were to surrender provide a rational basis for making offers to uninsured owners which are less generous than those made to insured residential owners.

[368] The majority accept that the insurance status of the offerees is a relevant consideration but that it should not have been "treated as determinative when deciding that there should be a differential and, if so, the nature and extent of that differential".[315] I accept that the insurance status of the offerees is not the only relevant consideration. In that sense I accept that it is not "determinative". On the other hand, I think it would be open to the government, having taken into account all other relevant considerations, to structure its new offers around the insurance status of the offerees. If the government were to do this, the practical effect would be that the insurance status of each offeree would be determinative as to the nature of the offer to be made.

Symmetry

[369] The majority proceed on the basis that in its June 2011 decision, "the Crown set the parameters … for future purchase decisions in the red zones".[316] I agree that this is so. The various documents which were prepared in relation to residential red-zone decisions make it clear that the government was seeking to deal as consistently as possible with the different groups of land-owners. Those involved were conscious that the decisions they were making set precedents for future decisions and should be consistent with earlier decisions.

[370] To achieve complete (or practically complete) ownership of all land in the residential red-zone without compulsory acquisition, the government was required to make offers which were sufficiently economically attractive to ensure acceptance by all (or nearly all) offerees. Fairness required that this attractiveness was by reference to the circumstances as they were prior to the June 2011 decision. On the other hand, the government was anxious not to make good economic losses suffered by

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315 See [165].
316 See [170].

those who could have obtained, but did not have, insurance. These considerations are reflected in the offers made in that:

(a) all have been pitched at levels which, when considered in aggregate, exceeded the June 2011 values of the economic interests which the offerees were required to surrender; and

(b) in no case has the government paid out for improvements which could have been, but were not, insured.

[371] Where complete consistency has not prevailed is in respect of land. In general, the government has been prepared to offer 50 per cent of the land value (in the 2007 rating valuations) for land which was not insured. However, in the case of 11 properties on which houses were under construction and seven non-residential properties owned by not-for-profit organisations, the government offered 100 per cent of land value. In these instances the owners were not able to obtain insurance in respect of their land. But the same is true of the owners of bare land who, under the September 2012 offers, receive only 50 per cent of land value. It is thus open to argument whether the different approaches to uninsurable land taken in the June 2012 and September 2012 decisions were appropriate. In this regard, I would not wish to be thought to be suggesting that the government is required to make offers at 100 per cent of land value in relation to bare land. Relevant to this is my discussion later in these reasons in respect of the land owned by Fowler Developments.[317] As well, arguments based on symmetry go only so far.

[372] It may be unrealistic to expect complete symmetry in the offers made to the different classes of property owners in the residential red zone particularly given decisions required in relation to damaged land which is outside of the residential red zone.[318] So if the distinction between the June 2012 and September 2012 offers as to uninsurable land cannot be justified, the better conclusion may be that it was the June 2012 offers which were "wrong" (as being over generous compared to the

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317 See below at [377]–[379].

318 At issue is what Professor Lon Fuller described as a polycentric problem, see "The Forms and Limits of Adjudication" (1978) 92 Harv L Rev 353. Such problems tend not to be susceptible to satisfactory adjudicative determination.

general governmental response to uninsured losses) rather than the September 2012 offers.

[373] As far as I can see, there is nothing in the decisions made prior to September 2012 which suggest that government should have made offers in relation to uninsured improvements. So a high level of symmetry would have been achieved if the September 2012 offers had extended to 100 per cent of land value in relation to bare land and insured commercial and industrial property.

Moral hazard and the risk of an undesirable precedent

[374] Moral hazard is mentioned in some of the material which precede the relevant decisions. On occasion the discussion was rather moralistic – along the lines that those who were uninsured were the authors of their own misfortune. I do not see this consideration as relevant to the further offers which are to be made. From the material to which we were taken by Mr Cooke, some of the appellants were just plain unlucky. As well, it is not possible to obtain insurance for land on which there is no house. So for those who had bare sections, there was no insurance available.

[375] That said, there is at least a theoretical risk of moral hazard if the government on this occasion treated uninsured owners on the same basis as insured owners. This could perhaps contribute to a public expectation that if a catastrophe is large enough, the government will step in and, in this way, reduce the incentive to insure. I personally would not put much weight on this given the reality that the Christchurch earthquakes have emphasised the need for adequate insurance. I note in passing that in his affidavit the Minister explained that moral hazard in the sense just discussed was not an important factor in relation to the September 2012 decision.

[376] Although I see the moral hazard in a strict sense as being of little or no materiality, the government is entitled to be cautious about taking steps which might be seen as setting a precedent, in the sense of giving rise to an expectation that it will cover uninsured losses caused by natural disasters. I can illustrate this most directly by reference to Fowler Developments Ltd which, as its name suggests, is a developer.

[377] Fowler Developments was the owner of 11 sections of vacant land in a subdivision adjacent to the Styx River estuary and lagoon. On the basis of the uncontradicted evidence of Dr Jan Kupec, a CERA engineer, the land has been significantly affected by earthquakes in the form of lateral spread, land cracking, ejected material, substantial settlement and embankment failure. To some extent this is a consequence of fill which had earlier been placed on the land. Given the settlement which has occurred, significantly more fill would be required to bring the land to the level required under current building rules. With the fill already there, the land is particularly susceptible to liquefaction, a susceptibility which would be increased by additional fill. Any house built there would require substantial and individually designed foundations. The risk of flooding in the area has been increased by reason of changes to the Styx River caused by the earthquakes. In the event of a 50 year flood, the land would be an island surrounded by water. And irrespective of the 11 June 2011 decision, it was at least uncertain whether the City Council would have been prepared to provide services to the subdivision.

[378] Fowler Developments has not produced valuation evidence to suggest that the value of the land in say early June 2011 was more than 50 per cent of the value assessed for the 2007 rating valuation. There is thus no indication that the financial loss the company has suffered was caused or contributed to by the June 2011 decision.

[379] If the government is required to pay Fowler Developments the full land value as assessed in the 2007 rating valuation, then:

(a) the many land-owners in Christchurch who have suffered uninsurable losses would be entitled to wonder why Fowler Developments should be insulated from loss when they have not received government payouts; and

(b) those suffering uninsurable losses resulting from future natural disasters may consider that they have a just claim on the bounty of the public.

[380] Moral hazard, in this broader sense, seems to me to have been extremely important in the decisions made by the government as to losses which could have been but were not the subject of insurance. As noted, there has been no instance yet of the government making payment in relation to losses which could have been, but were not, the subject of insurance. This seems to me to be a perfectly rational approach to take.

The economic effect of the June 2011 and September 2012 decisions on the appellants

[381] If the government's actions amounted to a de facto expropriation of the appellants' properties, they could fairly expect to receive the market value of those properties at the time of that de facto expropriation. But I do not see this argument as being of assistance to the appellants.

[382] The very substantial diminution in value of residential red-zone properties since September 2010 is primarily a function of the physical damage to the land caused by earthquakes and the impracticality (for economic reasons) of remediation. There is no evidence to show that the amounts offered to the appellants are less than the value of their properties immediately before the June 2011 decision and, indeed, the somewhat limited evidence suggests that, on the whole, the amounts offered exceed by many times the then value of the properties.

[383] Accordingly, it seems to me to be clear the combined effect of the June 2011 and September 2012 decisions have left the appellants, as a class, better off than they were prior to the June 2011 decision. In saying that, I accept that conceivably there may be one or more of the appellants who can fairly claim to have been prejudicially affected by the two decisions. If that is so, special consideration to their circumstances would be appropriate.

Other adverse impacts on the appellants

[384] The making of generous offers to insured residential property owners and somewhat less generous offers to other land owners along with resulting acceptances have accelerated the depopulation of the residential red zone. It is plausible to

conclude that this has contributed, at least in terms of timing, to an accelerated run-down in the provision of services to remaining residents and, in this way, has added to the pressure on them to leave. So I accept that the effect of the June 2011 and September 2012 decision has had a detrimental effect on the ability of those still there to make use of their properties for residential purposes.

[385] A problem with assessing the significance of this argument is that it is not easy to envisage a counter-factual which assumes no decision to the same general effect as that taken in June 2011. Most insured residential owners were always going to leave the residential red zone. For this reason, along with land damage and the costs of remediation, there was always going to be uncertainty about the continued provision of services and infrastructure. There is no reason to think that, in the absence of the June 2011 decision, that the houses in the residential red zone would continue to be serviced indefinitely.

Delay

[386] I consider that the delays which have occurred since the High Court judgment are simply incidents of the litigation. The government was entitled to appeal against the judgment of Panckhurst J and indeed was substantially successful in the Court of Appeal. And, given the appellants' appeal to this Court from the Court of Appeal judgment, the government was entitled to await the judgment of this Court before making further offers.

[387] Of more practical concern is the delay between the decisions of June 2011 and September 2012. As far as I can tell, serious and detailed consideration as to what offers should be made to uninsured residential red zone owners did not get underway until the early months of 2012 and the first formal manifestation of that consideration was in the form of a CERA briefing paper to the Minister of 3 April 2012. Rather more than five months elapsed before the September 2012 decisions were taken, although during that period – in June 2012 – decisions were taken in relation to residential properties with houses under construction and properties owned by not-for-profit organisations.

[388] I accept that this delay must have given rise to considerable concern and anxiety on the part of the appellants and I understand why they became frustrated, particularly as the areas in which they lived became depopulated and their living conditions deteriorated. I nonetheless consider that we are not particularly well-placed to make an assessment whether the delay was, or was not justifiable. Such assessment would require consideration of the other issues which had to be addressed by CERA. By way of example, after the June 2011 decision, some 9,770 properties were in the orange zone. Orange zone decisions appear not to have been finalised until March 2012.[319] And as well, CERA has faced many issues unrelated to the June 2011 and September 2012 decisions, not least the finalisation of the Recovery Strategy which was not concluded until May 2012.

Compensation for infelicities in the process

[389] As is apparent, I consider that the June 2011 decision was lawfully made and that we are not in a position to form an adverse conclusion as to delay. But assuming for the moment that there have been infelicities, I do not see this as providing a principled basis upon which this Court could compel the government to offer more for the uninsured properties than would otherwise be the case and, in particular, increase the September 2012 offers.

[390] There are two interconnected reasons for the view just expressed.

(a) Leaving aside any issues of legal principle involved, it seems to me to be clear that the September 2012 offers are, at least in general, for more than the properties were worth in June 2011. The actions of the government have thus not caused the appellants any economic loss.

(b) A conclusion that process infelicities result in the appellants receiving more than would otherwise be the case is tantamount to a conclusion

[319] This is based on a March 2012 media brief which suggested that decisions on the final 653 orange zone properties were expected by the end of that month. Indications of earlier progress were provided in announcements in November 2011 (that over 90 per cent of orange zone properties had been rezoned since June) and February 2012 (that 255 orange zone properties had been rezoned).

that they are entitled to compensation which seems to me to be inconsistent with the spirit at least, and probably the letter, of s 67.

[391] I should make it clear that I see no reason why the new offers should not include a component of what in effect would be interest.

The relevant terms of the Act

[392] Much reliance was placed on s 3 of the Act. And despite the repetition, I will set out again the primarily relevant parts of that section.

> **3 Purposes**
>
> The purposes of this Act are—
>
> (a) to provide appropriate measures to ensure that greater Christchurch and the councils and their communities respond to, and recover from, the impacts of the Canterbury earthquakes:
>
> …
>
> (c) to provide for the Minister and CERA to ensure that recovery:
>
> (d) to enable a focused, timely, and expedited recovery:
>
> …
>
> (f) to facilitate, co-ordinate, and direct the planning, rebuilding, and recovery of affected communities, including the repair and rebuilding of land, infrastructure, and other property:
>
> (g) to restore the social, economic, cultural, and environmental well-being of greater Christchurch communities:
>
> ...

[393] And again despite the repetition, I will set out s 10(1) and (2):

> **10 Powers to be exercised for purposes of this Act**
>
> (1) The Minister and the chief executive must ensure that when they each exercise or claim their powers, rights, and privileges under this Act they do so in accordance with the purposes of the Act.
>
> (2) The Minister and the chief executive may each exercise or claim a power, right, or privilege under this Act where he or she reasonably considers it necessary.
>
> …

[394] Mr Cooke's position was that the residential red zone residents (and perhaps owners) should be treated as a community and that the Act should be administered so as to ensure their recovery from the earthquakes and wellbeing. He said that given s 10(1), this practically requires that they be given the same offers as the insured property owners. He also maintains that for the purposes of s 10(2) the discrimination between insured and uninsured owners could not be considered to be "reasonably … necessary" or proportionate.

[395] Some support for these arguments is to be found in the reasons of the majority. I, however, take a different view. It cannot have been the purpose of the legislature to require the government to ensure that all groups of people be insulated from the economic consequences of the earthquakes. It seems to me that a group of people do not become a "community" for the purposes of the Act simply by sharing the characteristic of not having been insured. And I do not regard the purpose provisions of the Act as requiring the government to make good on losses which could have been but were not insured so ensure to ensure economic equality between insured and uninsured members of a community. More generally, although I see symmetry and consistency as relevant considerations, I do not consider it appropriate to regard the June 2011 offers as the starting point so that what must be justified as able to considered "reasonably … necessary" for the purposes of s 10(2) is the differential between the offers to be made and the June 2011 offers. Rather, I see the s 10(2) test as addressed to the new offers.

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