

BETWEEN

THE MINISTER FOR CANTERBURY
EARTHQUAKE RECOVERY

First Appellant

AND

THE CHIEF EXECUTIVE OF THE
CANTERBURY EARTHQUAKE RECOVERY
AUTHORITY
Second Appellant

AND

FOWLER DEVELOPMENTS LIMITED

First Respondent

AND

ERNEST TSAO AND OTHERS, WHO REFER
TO THEMSELVES AS THE “QUAKE
OUTCASTS”

Second Respondents

SUBMISSIONS BY THE HUMAN RIGHTS COMMISSION
14 OCTOBER 2013

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MAY IT PLEASE THE COURT

1. The Human Rights Commission was granted leave to intervene in this appeal as set out in the Minute of O'Regan P dated 16 September 2013. Leave was granted on the basis that the Commission was to file written submissions and appear by counsel at the hearing, but that it would be up to the panel hearing the appeal to decide whether they wish to hear from counsel for the Commission.

Summary of submissions

2. The Commission's submissions address the human rights obligations raised by the issues in this appeal.
3. The creation of the residential red zones was a significant step in the government's response to the Canterbury earthquakes. The government's decision that these areas of land would not be remediated as part of the recovery strategy had and continues to have a significant impact on the people living in those areas, which are already some of the worst affected areas of the city. The Commission's position is that it would have been more consistent with New Zealand's international human rights obligations, and in particular the obligation to adopt measures to give effect to those rights, for this and the related June 2011 decisions to have been made under the CER Act, rather than through executive process.
4. The decision to treat the small group of uninsured home owners differently from other home owners in the particular context of the residential red zones raises a serious issue of non compliance with New Zealand's international obligations. In particular, the decision raises issues of arbitrary and disproportionate interference with the right to enjoy one's home, and a retrogressive step by the government in protection of the right to housing (including security of tenure and adequacy of housing conditions).
5. The decisions relating to owners of bare land and commercial properties also raise issues in relation to property rights.
6. The Crown's position that these decisions did not engage the rights of the people affected by them indicates that the decisions were made without a proper consideration of New Zealand's international obligations to give effect to these rights.

New Zealand's human rights obligations and their domestic implementation

7. New Zealand is party to a range of international human rights instruments, including the Universal Declaration of Human Rights (UDHR),¹ the International Covenant on Civil and Political Rights (ICCPR)² and the International Covenant on Economic, Social and Cultural Rights (ICESCR).³
8. New Zealand has undertaken obligations to implement and protect these rights domestically.⁴ The two treaties allow for very limited exceptions to compliance.⁵
9. New Zealand has adopted a range of measures to implement its international human rights obligations. As New Zealand has consistently advised the various UN supervisory bodies in response to concerns that these rights are not sufficiently justiciable through the domestic courts,⁶ those rights not directly enacted in the New Zealand Bill of Rights Act 1990 are intended to be implemented through a range of topic specific legislation,⁷ and through the Courts' approach to judicial review and statutory interpretation.⁸
10. See for example New Zealand's reply to the Human Rights Committee's list of issues to be taken up in the consideration of the 5th periodic report (considering New Zealand's obligations under ICCPR):⁹

Certain Covenant rights are not directly reflected in the Bill of Rights Act but are given effect by other legislation and by common law. For example, the Privacy Act 1993, together with the common law tort of privacy, provides for

¹ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

² International Covenant on Civil and Political Rights 999 UNTS 171 (adopted 16 December 1966, International Covenant on Civil and Political Rights 999 UNTS 171 (adopted 16 December 1966, entered into force 23 March 1976). NZ ratified on 28 December 1978.

³ International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (signed 16 December 1966, entered into force 3 January 1976). NZ ratified on 28 December 1978.

⁴ Art 2 ICCPR, art 2 ICESCR.

⁵ Art 4 ICCPR, art 4 ICESCR. Art 27 of the Vienna Convention on the Law of Treaties (done at Vienna on 23 May 1969) also confirms that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." New Zealand has not lodged any relevant reservations to the ICCPR or ICESCR in terms of art 21 of the Vienna Convention.

⁶ See New Zealand's 3rd periodic report on the Implementation of the International Covenant on Economic, Social and Cultural Rights E/C.12/NZL/3 17 January 2011, at [18] onwards, under the headings "Information relating to the implementation of the Covenant" and "Response to the Committee's comments on New Zealand's second report: Justiciability"; the Replies by the Government of New Zealand to the list of issues E/C.12/NZL/Q/3/Add.1 26 January 2012, at [3] – [8]; and New Zealand's response to the Human Rights Council to the recommendations of the working group on the universal periodic review A/HRC/12/8/Add.1 7 July 2009, at page 4.

⁷ For example, as listed in New Zealand's 3rd periodic report to CESCR (reference above) at [27]: the Education Act 1989, the Energy Efficiency and Conservation Act 2000, the Environment Act 1986, the Local Government Act 2002 and the Resource Management Act 1991.

⁸ As recently illustrated in the Supreme Court decision in *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [21] and at [24] – [25]. See also *Tavita v Minister of Immigration* [1994] 2 NZLR 257 at 265 – 266.

⁹ Reply to the list of issues to be taken up in connection with the consideration of the fifth periodic report of New Zealand CCPR/C/NZL/Q/5/Add.1 5 January 2010 at page 1.

rights of personal privacy (although these are also in part addressed through the right against unreasonable search and seizure). Similarly, the Children, Young Persons and their Families Act 1989, the Care of Children Act 2004 and other related legislation give effect to the rights of families and children. These legislative provisions are complemented by the well-established principle of New Zealand law that, wherever possible, legislation is to be interpreted consistently with the Covenant and other international human rights obligations.

11. While New Zealand's approach to implementing these rights has been criticised by the UN bodies,¹⁰ the government has confirmed that these rights are nonetheless of paramount importance. For example, in the 3rd periodic report on the Implementation of the ICESCR, the government stated:¹¹

New Zealand acknowledges the fundamental importance of economic, social and cultural rights, and assures the Committee that the indivisibility of human rights is a principle of paramount importance to New Zealand. ...

The scope of particular rights to housing, home and property

12. While certain rights appear to be particularly relevant to the issues raised in this appeal and are discussed in more detail here, it is important not to approach the issues of human rights compliance as a form of 'checklist' which considers each right in isolation, as: "all human rights are universal, indivisible, interdependent and interrelated."¹²
13. Further, as outlined by the IASC Guidelines discussed below, a wide range of human rights will be engaged in the context of the response to a natural disaster, and a rights based approach recognising and respecting all rights is necessary to ensure adequate protection of the human rights of those affected.¹³

Right to housing: art 11 ICESCR

14. The right to housing is part of the right to an adequate standard of living recognised in art 11 of ICESCR:

¹⁰ The concerns of the UN Committee on Economic, Social and Cultural Rights as to the justiciability of the rights under ICESCR are recorded in both the list of issues and the concluding observations from the Committee in response to New Zealand's third period report: see E/C.12/NZL/Q/3 14 June 2011 (list of issues) at [1], and E/C.12/NZL/CO/3 18 May 2012 (concluding observations) at [9]. See similarly in the context of ICCPR the list of issues to be taken up in connection with the consideration of the fifth periodic report (CCPR/C/NZL/Q/5 24 August 2009) at [1].

¹¹ E/C.12/NZL/3 17 January 2011, at [18] under the heading "Information relating to the implementation of the Covenant: Response to the Committee's comments on New Zealand's second report: Justiciability".

¹² World Conference on Human Rights in Vienna, Vienna Declaration and Programme of Action UN Doc A/ CONF.157/23, 12 July 1993. (at 5) (endorsed by General Assembly Resolution 48/121).

¹³ Inter-Agency Standing Committee, *Human Rights and Natural Disasters. Operational Guidelines and Field Manual on Human Rights Protection in Situations of Natural Disaster*, January 2011 at pages 10 – 11.

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.
15. The right to adequate housing is described by the UN Committee on Economic, Social and Cultural Rights (CESCR) as being of “central importance for the enjoyment of all economic, social and cultural rights”, and:¹⁴
- ... the right to adequate housing cannot be viewed in isolation from other human rights contained in the two International Covenants and other applicable international instruments. Reference has already been made in this regard to the concept of human dignity and the principle of non-discrimination. In addition, the full enjoyment of other rights - such as the right to freedom of expression, the right to freedom of association (such as for tenants and other community-based groups), the right to freedom of residence and the right to participate in public decision-making - is indispensable if the right to adequate housing is to be realized and maintained by all groups in society. Similarly, the right not to be subjected to arbitrary or unlawful interference with one's privacy, family, home or correspondence constitutes a very important dimension in defining the right to adequate housing.
16. The Committee has confirmed that art 11 recognises the right to live somewhere in security, peace and dignity, and that it incorporates rights to security of tenure, availability of services, facilities and infrastructure, and affordability. General Comment 4 provides:¹⁵
7. In the Committee's view, the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity. This is appropriate for at least two reasons. In the first place, the right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised. This "the inherent dignity of the human person" from which the rights in the Covenant are said to derive requires that the term "housing" be interpreted so as to take account of a variety of other considerations, most importantly that the right to housing should be ensured to all persons irrespective of income or access to economic resources. Secondly, the reference in article 11 (1) must be read as referring not just to housing but to adequate housing. As both the Commission on Human Settlements and the Global Strategy for Shelter to the Year 2000 have stated: "Adequate shelter means ... adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities - all at a reasonable cost".
8. Thus the concept of adequacy is particularly significant in relation to the right to housing since it serves to underline a number of factors which must be taken

¹⁴ United Nations Committee on Economic, Social and Cultural Rights (1991), General Comment No.4. *The right to adequate housing: Article 11(1) CESCR* at [1] and [9].

¹⁵ The General Comments are statements issued by the UN bodies responsible for the various treaties, and, where relevant, determining individual complaints against States under the treaties. They are therefore authoritative and highly relevant statements on the proper interpretation of the treaty provisions.

into account in determining whether particular forms of shelter can be considered to constitute "adequate housing" for the purposes of the Covenant. While adequacy is determined in part by social, economic, cultural, climatic, ecological and other factors, the Committee believes that it is nevertheless possible to identify certain aspects of the right that must be taken into account for this purpose in any particular context. They include the following:

(a) Legal security of tenure. Tenure takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property. Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. ...

(b) Availability of services, materials, facilities and infrastructure. An adequate house must contain certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services;

(c) Affordability. Personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised. Steps should be taken by States parties to ensure that the percentage of housing-related costs is, in general, commensurate with income levels. States parties should establish housing subsidies for those unable to obtain affordable housing, as well as forms and levels of housing finance which adequately reflect housing needs. ...

(d) Habitability. Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. The physical safety of occupants must be guaranteed as well. ...

(e) Accessibility. Adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Thus, such disadvantaged groups as the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other groups should be ensured some degree of priority consideration in the housing sphere. Both housing law and policy should take fully into account the special housing needs of these groups. ...

(f) Location. Adequate housing must be in a location which allows access to employment options, health-care services, schools, child-care centres and other social facilities. This is true both in large cities and in rural areas where the temporal and financial costs of getting to and from the place of work can place excessive demands upon the budgets of poor households. Similarly, housing should not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants;

(g) Cultural adequacy. ...

"Progressive realisation" of ICESCR rights

17. Implementation of ICESCR raises particular issues arising from the "progressive realisation" provisions of the Covenant. New Zealand's implementation obligations are set out in art 2.1 as follows:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

18. The provision for progressive realisation does not mean however that these rights are simply ‘aspirational’. In the first place, there are some rights in the treaty that require immediate implementation by all States, such as the guarantee of non discrimination. Secondly, for rights subject to progressive realisation, including the right to housing, States are required to actively “take steps” “by all appropriate means” and to the “maximum of [their] available resources”. There is a positive obligation to make progress towards full realisation, and unjustified retrogressive steps will be in direct contravention of the Covenant.
19. This is confirmed by General Comment 3 issued by CESCR, discussing the scope of State’s obligations under art 2:¹⁶

... the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.

20. The Committee describes States’ obligations as falling into three types: to *respect* (in the sense of not itself infringing), to *protect* (not permitting others to infringe the right); and to *fulfil* (incorporating an obligation to facilitate, and where necessary, to provide).¹⁷

¹⁶ United Nations Committee on Economic, Social and Cultural Rights (1990), General Comment No.3. *The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)* at [1] – [2] and [9] in particular.

¹⁷ See for example General Comment 13 at [46] – [47] (and in similar terms General Comment 12 at [15]): “The right to education, like all human rights, imposes three types or levels of obligations on States parties: the obligations to respect, protect and fulfil. In turn, the obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide. // The obligation to respect requires States parties to avoid measures that hinder or prevent the enjoyment of the right to education. The obligation to protect requires States parties to take measures that prevent third parties from interfering with the enjoyment of the right to education. The obligation to fulfil (facilitate) requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education. Finally, States parties have an obligation to fulfil (provide) the right to education. As a general rule, States parties are obliged to fulfil (provide) a specific right in the Covenant when an individual or

21. Art 11 of the ICESCR therefore requires New Zealand to respect, protect and fulfil (including where appropriate provide), the right to adequate housing, including security of tenure, affordability, access to services and infrastructure, and habitability. Any retrogressive step must be clearly justified.

Right to home

22. Article 17 of the ICCPR provides:
1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
 2. Everyone has the right to the protection of the law against such interference or attacks.
23. The Court of Appeal noted the importance of this right in *Winther v Housing New Zealand*.¹⁸
24. The European Court of Human Rights describes this right as “of central importance to the individual’s identity, self determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community”.¹⁹ The Court confirmed that the importance of this right to the individual must be taken into account when considering the margin of appreciation allowed to national authorities,²⁰ and stressed the importance of procedural safeguards and a fair process for affected individuals when assessing whether an interference is justified:²¹

The procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when [interfering with the right] remained within its margin of appreciation. In particular, the Court must examine whether the decision making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8 [of the European Convention for the protection of human rights and fundamental freedoms. Art 8 of the ECHR is equivalent to art 17 ICCPR].

25. The concept of “interference” is obviously less than total negation, and includes any action that interferes with a person’s enjoyment of their home. “Home” is understood as the place where a person resides or carried out his or her usual

¹⁸ group is unable, for reasons beyond their control, to realize the right themselves by the means at their disposal. However, the extent of this obligation is always subject to the text of the Covenant.”

Winther v Housing New Zealand [2010] NZCA 601; [2011] 1 NZLR 843 at [74].

¹⁹ *Connors v United Kingdom*, (2004) 16 BHRC 639 at [52].

²⁰ *Gilllow v United Kingdom*, (1989) 11 EHRR 335 at [55].

²¹ *Connors v United Kingdom*, (2004) 16 BHRC 639 at [83]. See also *Chapman v United Kingdom* (2001) 33 EHRR 399 at [92], and by way of example *R v North & East Devon District Health Authority ex p Coughlan* [2001] QB 213, [2000] 3 All ER 850 at [90] – [93].

occupation.²² Obviously, only unlawful or arbitrary interference will contravene the right.

26. The Human Rights Committee General Comment 16 confirms that “arbitrary” is a separate concept from “unlawful”, and that an interference with one’s home may be lawful in terms of domestic law (which itself must comply with the principles of the Covenant), but still contravene art 17 as being arbitrary.
27. The Committee in the same General Comment also confirms that “arbitrary” in this context does not mean “irrational” in the *Wednesbury* sense, but rather not in accordance with the provisions, aims and objectives of the Covenant.²³

The term “unlawful” means that no interference can take place except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant.

The expression “arbitrary interference” is also relevant to the protection of the right provided for in article 17. In the Committee’s view the expression “arbitrary interference” can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.

28. Whether an interference is “arbitrary” therefore requires an assessment of whether the interference is reasonable, proportionate and consistent with the Covenant.²⁴ The test is similar to that laid down in s 5 of the Bill of Rights Act.²⁵ As noted above, the provision of procedural safeguards and a fair process for affected individuals will be an important part of that assessment.
29. Art 2 of the ICCPR requires New Zealand to ensure that there is an effective remedy available through competent judicial, administrative or legislative authorities, and to “develop the possibilities of judicial remedy” for any violation of this right.

Right to property

30. Article 17 of the UDHR provides:

²² United Nations Human Rights Committee (1988), General Comment No. 16: *The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17)* at [5].

²³ At [3] – [4].

²⁴ See for example *Mohammed Sahid v. New Zealand*, CCPR/C/77/D/893/1999 (11 April 2003) at [4.13], and *Toonen v Australia* No. 488/92, U.N. Doc CCPR/C/50/D/488/1992 (1994) at [8.3].

²⁵ The approach to s 5 was recently discussed in *CPAG v AG* [2013] NZCA 402, see in particular [79] – [103].

- (1) Everyone has the right to own property alone as well as in association with others.
- (2) No one shall be arbitrarily deprived of his property.
31. The right to property is not reflected in either of the ICCPR or ICESCR, principally as a result of the intractable differences that arose out of the ideological division between the capitalist and socialist countries during the Cold War. However, non inclusion does not equate with a denial of the right, as recorded for example in the ICCPR *travaux préparatoires*:²⁶
- ... no one questioned the right of the individual to own property ... it was generally admitted that the right to own property was not absolute and there was wide agreement that the right ... was "subject to some degree of control by the State" while "certain safeguards against abuse must be provided ..."
32. The common law right to property was discussed in the recent decision of the Supreme Court in *Waitakere City Council v Estate Homes Ltd*.²⁷ As noted by the Court, the principal general measure of constitutional protection is under the Magna Carta which requires that no one "shall be dispossessed of his freehold ... but by ... the law of the land."²⁸

Human rights obligations in responding to natural disasters

33. Natural disasters raise complex and significant human rights issues, both in the initial response and in the recovery phase. These issues have been recently outlined in the 2011 revised IASC operational guidelines for the protection of persons in situations of natural disasters.²⁹ The guidelines emphasise the

²⁶ Annotations on the text of the draft International Covenants on Human Rights, 1/7/95 UN Doc. A/2929 at [197], [202] and [206].

²⁷ *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112; [2007] 2 NZLR 149 at [45].

²⁸ Chapter 29 of Magna Carta, which remains part of New Zealand law under s 3(1) and the First Schedule of the Imperial Laws Application Act 1988.

²⁹ Inter-Agency Standing Committee, *Human Rights and Natural Disasters. Operational Guidelines and Field Manual on Human Rights Protection in Situations of Natural Disaster*, January 2011. The Inter-Agency Standing Committee was established in June 1992 in response to the UN General Assembly Resolution 46/182 on the strengthening of humanitarian assistance, and is an interagency forum for co-ordination, policy development and decision-making involving the key UN and non UN humanitarian partners. The Office of the High Commissioner for Human Rights is a standing invitee to the Committee. The first guidelines were published in 2006. The guidelines are primarily aimed to help international and NGO humanitarian organisations (see page 7), but they also provide a useful guidance for government actors on the implementation of a rights based response to natural disasters, and record that they may also inform national policies and laws (page 8), recognising that (at page 13 [II.2]) "States have the primary duty and responsibility to provide assistance and protection to persons affected by natural disasters. In doing so, they are obliged to respect the human rights of affected persons ..." The guidelines are based on the relevant human rights instruments (see fn 8 on page 9) but are not of course in themselves binding on any group or government.

importance of adopting a human rights based approach to the response to natural disasters:³⁰

Often, negative impacts on the human rights concerns after a natural disaster do not arise from purposeful policies but are the result of inadequate planning and disaster preparedness, inappropriate policies and measures to respond to the disasters, or simple neglect.

...

These challenges could be mitigated or avoided altogether if the relevant human rights guarantees were taken into account by national and international actors, in all phases of the disaster response: preparedness, relief and recovery.

34. The guidelines explain further the importance of taking a rights based approach:

A protection perspective can bring a strategic dimension to humanitarian assistance programmes, namely one of promoting and securing the fulfillment of human rights. Experience shows that assistance cannot simply be assumed to be a neutral activity affecting everyone equally and in a positive way. The manner in which assistance is delivered, used and appropriated, as well as the context in which it is taking place, has an important impact on whether the needs and human rights of affected persons are being respected or fulfilled. A human rights-based approach provides the framework and necessary standards for humanitarian assistance activities. It grounds the basis for humanitarian action in universal principles, such as human dignity and non-discrimination, as well as a set of universally accepted human rights. Those affected by the disaster thus become individual rights holders who can claim rights from particular duty bearers rather than simply being passive beneficiaries and recipients of charity.

35. And refer with particular concern to the recovery phase:

Experience has shown that, while patterns of discrimination and disregard for human rights may emerge during the emergency phase of a disaster, the longer the effects of the disaster last, the greater the risk of human rights violations becomes.

36. The guidelines also emphasise the importance of engagement with affected communities as part of a rights based approach, including for example the following in the statement of general principles.³¹

Affected persons should be informed and consulted on measures taken on their behalf and given the opportunity to take charge of their own affairs to the maximum extent and as early as possible. They should be able to participate in the planning and implementation of the various stages of the disaster response. Targeted measures should be taken to include those who are traditionally marginalized from participation in decision-making.

37. The guidelines discuss the protection of rights related to housing, land and property and livelihoods in Section C, noting (page 9) that “these are economic,

³⁰ At page 2.

³¹ At [1.3] on page 11, see also pages 7 and 8.

social and cultural rights that start becoming particularly relevant once the emergency phase is over and the recovery effort commences.”

38. Section C commences on page 39 of the guidelines. The first stated Guideline is C1.1:

C.1.1 The right to property should be respected and protected. It should be understood as the right to enjoy one’s house, land and other property and possessions without interference and discrimination. Property related interventions should be planned accordingly. Property rights, whether individual or collective, should be respected whether they are based on formal titles, customary entitlements or prolonged and uncontested possession or occupancy.

39. Guideline C.2 discusses transitional shelter, housing and evictions, including the following, emphasising the importance of engagement with affected communities:

C.2 TRANSITIONAL SHELTER, HOUSING AND EVICTIONS

C.2.1 Transitional shelter or housing provided should fulfil the requirements of adequacy in international human rights law. The criteria for adequacy are: accessibility, affordability, habitability, security of tenure, cultural adequacy, suitability of location, and access to essential services such as health and education (see B.1.2). Respect for safety standards aimed at reducing damage in cases of future disasters is also a criterion for adequacy.

...

C.2.3 All affected groups and persons should be consulted and participate in the planning and implementation of transitional shelter and permanent housing programmes, for tenants and owners/occupiers. Any decision to move from emergency shelter to transitional shelter or permanent housing requires the full participation and decision/agreement of the persons concerned.

C.2.4 Should evictions become unavoidable in situations other than forced evacuations (see A.1.4 above) and despite consultation and participation in accordance with C.2.3, all the following guarantees should be put in place:

- (a) An opportunity for genuine consultation with those affected;
- (b) Adequate and reasonable notice prior to the scheduled date of eviction;
- (c) The timely provision of information in an accessible format on the eviction and future use of the land ... [list continues³²]

C.2.5 Evictions – in particular those ordered in the context of evacuations and of secondary occupation of property and possessions left behind by internally displaced persons – should not render individuals homeless or vulnerable to the violation of other human rights. Appropriate measures should be taken to ensure that adequate alternative shelter is made available to those unable to provide for themselves.

³²

Noting that this Guideline reflects the requirements of CESCR General Comment 7 at [14] – [p16] addressing the right to housing in the context of justified evictions.

40. The importance of a rights based approach to the government's response to the Canterbury earthquakes, with particular emphasis on the right to housing, has been recently endorsed by CESCR in the concluding observations on New Zealand's 3rd periodic report:³³

The Committee notes the challenges caused by the recent earthquakes on the enjoyment of Covenant rights by persons affected, especially their right to housing. (art. 11, 2(2))

The Committee recommends that the State party adopt a human rights approach to reconstruction efforts, ensuring thereby appropriate consideration to availability, affordability and adequacy of housing, including for temporary housing. In this regard, the Committee refers the State party to its general comment No. 4 (1991) on the right to adequate housing. ...

41. The government is similarly indicating in its draft Universal Periodic Review report to the Human Rights Council recently published for final consultation,³⁴ that it also considers a rights based approach to responding to the earthquake to be a key priority. Item 6 in the "key national priorities, initiatives and commitments" listed on page 21 is stated as:

ensuring the human rights impacts of the Canterbury Earthquake are accounted for in the on-going decisions around the rebuild.

42. And earlier in the draft report at [26]:

The Government recognises there have been some governance and human rights issues and as a result of the earthquake, but views these as unavoidable against challenging circumstances. For example, the 2011 Census was not held in March 2011 as planned, and instead took place in March 2013. UPR consultations identified a series of other issues arising from the earthquake including access to education, housing, insurance and information; access and accommodation issues for persons with disabilities; and delays around the rebuild. The Government is aware of these issues, and recognises the need to consider the full range of human rights impacts of the earthquake in its on-going response and decisions on the rebuild.

The response to the Canterbury earthquakes: the CER Act 2011

43. The Canterbury Earthquake Recovery Act 2011 (CER Act) appears to include specific provision for consideration and implementation of New Zealand's international human rights obligations in the context of responding to the Canterbury earthquakes. In particular, the Act provides for:

³³ E/C.12/NZL/CO/3 18 May 2012 at [21] under the heading "principal subjects of concern and recommendation".

³⁴ Ministry of Foreign Affairs and Trade, Draft New Zealand National UPR Report (2013). (<http://www.mfat.govt.nz/downloads/globalissues/Draft%20UPR%20Report%20released%202013.pdf>). The report is due to be submitted on 4 November 2013, and the review of the report is due to take place in Geneva in January 2014.

- 43.1. input into decision making by communities (Part 2);
- 43.2. the development and implementation of recovery plans and a recovery strategy, including provisions to address the areas where building may or may not occur; any social, economic, cultural or environmental matter; directing the Minister to have regard to the needs of the people affected by the recovery plan and the New Zealand Disability Strategy; and specifying a process of public consultation (Part 3);
- 44. The intention to ensure a rights based approach to decisions concerning the recovery is apparent from the purposes of the Act set out in s 3, which include:
 - (b) to enable community participation in the planning of recovery of affected communities without impeding 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;
- 45. This is also apparent from legislative history. See for example:
 - 45.1. The Explanatory Note to the Bill.³⁵

The Bill is founded on the need for community participation in decision-making processes while balancing this against the need for a timely and coordinated recovery process. ...

... [under the heading “planning regime”] Planning for the recovery of the greater Christchurch region will occur through the development of a Long-Term Recovery Strategy ... Underneath the Recovery Strategy will sit a series of more detailed Recovery Plans that will set out the detail of what needs to be done and how it will be implemented. Recovery Plans will be able to cover – any social, economic, cultural, or environmental matter ...

... It is expected that processes for community consultation will be an integral component of the development of such plans ...
 - 45.2. The Regulatory Impact Statement which lists at [13] as part of the dimensions of the recovery task the need for significantly greater central government investment, and “a recovery effort that is multi-pronged, covering not just physical rebuilding but social, economic and community rebuilding, in order for any one part of the recovery to be

³⁵ Canterbury Earthquake Recovery Bill 286-1, at page 1.

effective”, and “coordinated engagement and more effective information management (gathering and disseminating) in order to build and maintain confidence in the recovery process.” And, at [15]:

The purpose of the legislation is to ... respond to the social, community and economic development issues that confront greater Christchurch following the events.

- 45.3. First reading Hon Gerry Brownlee, Minister for Canterbury Earthquake Recovery:³⁶

The purpose of the bill is to provide appropriate measures to ensure that greater Christchurch and its communities respond to, and recover from, the impacts of the earthquakes; to enable community participation in the planning, the recovery, and the rebuilding of affected communities without impeding a focused, timely, and expedited recovery; to facilitate and direct the planning, rebuilding, and recovery of affected communities, including the repair and rebuilding of infrastructure and other property; and to restore the social, economic, cultural, and environmental well-being of greater Christchurch communities.

... Overall, this Bill enables the Government to move swiftly to restore the social and economic well-being 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. ...

46. In line with the assurances given by New Zealand to the UN supervisory bodies regarding the justiciability of the ICESCR and ICCPR rights not directly incorporated into the Bill of Rights Act, discussed above, this Act would also provide the framework for the domestic implementation of these rights in the response to the earthquakes, through judicial review and the presumption that legislation is to be interpreted consistently with international human rights obligations.
47. The Commission accordingly does not fully agree with the Crown’s submissions at [6.6] that the CER Act was not intended to “tie the hands of the Government” in responding to the earthquakes. The Act provides for significant constraints through:
- 47.1. promising transparency and public engagement in the planning and implementation of the recovery (balanced against the need for expedition);
- 47.2. its provision for strategic and coherent planning that is to include a focus on the social, economic, cultural, and environmental well-being of

³⁶

Minister’s First Reading Speech, 671 NZPD, 17898.

greater Christchurch communities, and requiring the Minister to directly consider the needs of the people affected by any plan; and

- 47.3. providing a platform for the domestic implementation and justiciability of New Zealand's human rights obligations.

The residential red zone decisions

48. The decision to declare the residential red zones was a significant element of the government's response to the Canterbury earthquakes. In the Commission's view, the decision cannot be characterised as merely an announcement of information, combined with offers to purchase certain properties. Rather, as set out in the Memorandum for Cabinet of 24 June 2011 recording the decisions, the decisions leading to the announcement of the residential red zones involved:

- 48.1. A decision by the government that certain areas of residential land would not be remediated in the short to medium term;³⁷
- 48.2. The proposed publication of zones (determined by the government on the basis of technical, economic and social criteria) to provide immediate certainty (at least for the green and red zones) as to whether those areas would be remediated or not;³⁸
- 48.3. A recognition that the long term deferral of remediation work meant that communities should be moved from the red zones;³⁹

³⁷ COA 4:120 at [5]: sets out objectives for the government to consider in determining where rebuilding can occur or is unlikely to be possible; at [8] setting out the criteria that will be applied to determine the areas where rebuilding is unlikely to be practicable; at [9] "where these criteria are met ... the government should consider how it can best support recovery in these areas"; at [21] – [23] "... Certainty about land issues will allow longer terms decisions to be made for business premises ... Private insurers are ... uncertain of the nature and extent of government's role. In Waimakariri all land remediation works have been put on hold since the June 2013 aftershocks; however the Spencerville pilot scheme is continuing. I consider there is an urgent need to provide a reasonable degree of certainty to residents in these areas in order to support the recovery process. Speeding up the process of decision-making is crucial for recovery and in order to give confidence to residents, businesses, insurers and investors. This is particularly the case in the worst-affected suburbs, where the most severe damage has repeatedly occurred.>"; at [34] – [40] discussing the "criteria for determining the government's role in land remediation", including at [40]; "I consider that the social disruption ... adds further weight to any decisions not to commit to remediation at this stage where it currently appears not to be cost-effective"; at [42] under the heading "where does government have a role?" listing the four zones including green "repair rebuilding can begin" and red "land repair would be prolonged and uneconomic". Noting also that this represented a change in approach by the government: prior to the February 2011 earthquake the government had been working towards remediation of all areas affected by the earthquakes (Brownlee COA2:27 at [9] – [12]).

³⁸ COA 4:120 as above, esp at [34] – [41]. The criteria were subsequently modified in August: COA 4:131, cf CERA presentation COA 4:143 at page 5.

³⁹ COA 4:120 at [74] – [75]: "... The Government has determined that it is neither practicable nor reasonable for these communities to stay in the Red Zone areas during the extensive time required to

- 48.4. A decision by the government that the majority of land owners in that area would be assisted to leave the area through government purchase of their properties at a price that would preserve the pre-earthquake equity in their homes;⁴⁰
- 48.5. A recognition that the decision not to remediate these areas and to encourage the majority of home owners to leave, would mean that essential services would not be replaced and were unlikely to be maintained beyond a short term temporary period, and a decision that local councils would be expected to act accordingly.⁴¹
49. As recorded in the later statements, the government also recognised that the effect of these decisions were that property owners who remained in the red zones would not be able to obtain insurance, would not be able to sell their properties, and would be living in “bleak” circumstances.⁴²
50. The creation of zones with the express purpose of specifying areas where entire communities were intended to be relocated from their homes obviously engages a range of human rights. Most obvious are the rights to housing and home discussed above: residents were faced with either leaving their homes or remaining in what were to be effectively abandoned communities,⁴³ with degenerating services and infrastructure. A government policy of relocation impacts on security of tenure and the right to enjoy one’s home in peace,⁴⁴ and raises issues about the adequacy of proposed alternatives.⁴⁵ A policy which also leaves people behind in abandoned communities raises issues with the adequacy of the housing conditions that remain, as discussed further below.

⁴⁰ fully design remediation solutions. For the residents in these areas this will mean progressively relocating out of the area and that new permanent infrastructure should not be installed there until this uncertainty is resolved.” See also for example the press release at COA4:123.

COA 4:120 at [57] – [58].

⁴¹ COA 4:120 at [52]; “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.”

⁴² As described by the Prime Minister, see for example COA 4:149 and COA 7:306. See also the purchase offer supporting information at COA 6:264 at page 5.

⁴³ See for example the discussion in Mr Sutton’s affidavit at COA 2:18 [13] – [17].

⁴⁴ See for example *R v North & East Devon District Health Authority ex p Coughlan* [2001] QB 213, [2000] 3 All ER 850 at [90] – [93] (right engaged in decision to relocate patients from long term care facility); *Chapman v United Kingdom* (2001) 33 EHRR 399 at [68] – [78] (right engaged in decision to refuse planning consent to allow continued occupation of a caravan on the property).

⁴⁵ This issue is relevant both to the ICESCR rights to adequate housing, but also to the assessment of the interference with one’s home under ICCPR: see for example *Connors v United Kingdom*, (2004) 16 BHRC 639 at [102], *Howard v United Kingdom*, Application no.10825/84, European Court of Human Rights, 18 October 1985, at page 205.

51. Whether the impact of the June 2011 decisions on the right to housing and the interference with home was justified as proportional and consistent with the aims and objectives of the treaties is a complex assessment. As outlined above, the level of engagement with those affected by the decisions will be important, as will issues such as whether the decisions were based on sufficient and sufficiently robust information to be reasonable and proportionate, whether they are tailored enough to avoid being unduly arbitrary in their application, and the potential impact on vulnerable groups such as children, the elderly, and people with disabilities. In addition, there are a range of ‘consequential’ issues that arise: the availability and affordability of alternative housing solutions, the impact of those on access to work and education and community participation, consideration of the adequacy of housing and access to services for those left behind, and so on.
52. The Commission notes that some (though not all) of these issues are recorded as having been under specific consideration at the time of the June 2011 decisions. Attention was given to the rehousing of people relocating from the red zones,⁴⁶ processes for providing information to communities after the announcement, and co-ordinating support, especially for the most vulnerable households.⁴⁷ The offer to purchase homes at the 2007 valuation is also obviously a key factor in assessing the adverse impact of the decision that these areas would not be remediated, as these offers would support residents in relocating out of the areas, and would provide significant assistance in terms of accessing affordable alternative housing options.
53. The Commission is concerned with the choice of process by the government in reaching these decisions.⁴⁸
54. As discussed above, the CER Act provides legislative objectives and protections which broadly reflect New Zealand’s international human rights obligations, and also provides a platform for the domestic ‘enforcement’ of those rights through judicial review and the presumptions of statutory interpretation.
55. The executive process adopted, on the other hand, appears to offer none of those constraints or protections.⁴⁹

⁴⁶ COA 4:120 at [70] – [71].

⁴⁷ COA 4:120 at [82].

⁴⁸ It appears that the option of following the CER Act planning processes was considered (at least in relation to the implementation of the decision to ‘retire’ areas of land) prior to the June 2011 residential red zone decisions. For example, a CERA paper of 1 June 2011 sets out five alternatives of proceeding inside or outside the CER Act, including as option D a direction from the Minister that a recovery plan be produced under s 16: COA 3:67, noting the covering email at COA 3:66.

56. To the extent that the scope of the CER Act is at issue in this appeal, the Commission’s position is that interpreting the CER Act broadly, to include in its scope the subject matter of the residential red zone decisions, would be more consistent with New Zealand’s human rights obligations, both in giving effect to these rights directly and in advancing the obligation to ensure that they are domestically justiciable.
57. The Commission also notes that one of the key differences between the two processes is the provision in the CER Act for community participation and engagement with those directly affected by the decisions (albeit subject to justified necessary restrictions where urgency is required). In addition to its significance in the context of the rights to home and housing discussed above, community participation in the conduct of public affairs is recognised as a right in itself in art 25 of the ICCPR. As confirmed in General Comment 25,⁵⁰ the right of participation in the “conduct of public affairs” is a broad concept, and participation may include popular assemblies and bodies created to represent citizens in consultation with government. The importance of this right provides a further indication that where Parliament has established provision for such participation, it should not be readily inferred that executive processes which effectively bypass those provisions can also be employed.

Uninsured home owners

58. For insured home owners the announcement of the residential red zones in June 2011 was closely accompanied by the information that offers for purchase would be made. In contrast, the position of uninsured home owners was deliberately left open, with the suggestion that they would be treated differently because “they should have been aware of the risks when choosing not to purchase insurance.”⁵¹
59. The June 2011 decisions on the future of these areas had the same impact on uninsured home owners as on insured home owners, in terms of their right to housing and interference with their home, including impaired security of tenure, loss of value,⁵² issues with the on-going adequacy and safety of housing, and the

⁴⁹ The Crown position appears to be that the decisions are not even subject to judicial review: submissions [5.4] and [5.8].

⁵⁰ United Nations Human Rights Committee (1996) General Comment No. 25: *The right to participate in public affairs, voting rights and the right of equal access to public service* (Art. 25) at [5] and [6]. COA 4:120 at [62].

⁵¹ Noting that the Valuer-General appears to have confirmed that the announcement of red zone would have itself caused a loss of value in properties in the zones: Sullivan 2 COA 2:15 at [4].

prospect of the abandonment of their neighbourhood and the reduction or loss of services and infrastructure.

60. However, the subsequent difference in treatment between the insured and uninsured homeowners significantly alters the balance of the assessment of whether the rights to housing have and continue to be adequately respected and protected as required by ICESCR, and whether the interference with home was reasonable, proportionate and consistent with the ICCPR.
61. The first key difference is timing:
 - 61.1. A decision was not made for a further 15 months on whether, and if so, how, government would provide support for these home owners, despite the fact that they were in the areas worst affected by the earthquakes, and were in addition facing the dissolution and degeneration of their neighbourhoods following the announcement of the creation of the red zones.⁵³
 - 61.2. The decisions in September 2012 were not made under conditions of urgency, and did not affect a significant number of people, compared with the June 2011 decisions.⁵⁴ There was therefore apparently little to prevent a proper engagement with these home owners or a more detailed assessment and tailoring of approach.
62. The second key difference is the decision to offer a significantly lower purchase price, meaning a significantly lower level of financial assistance to home owners to relocate. This distinction is drawn solely on the basis that these home owners were not insured.
63. A range of factors are put forward to explain the importance of that distinction. The Crown's submissions at [9.2] – [9.7] set out three reasons, with reference to Minister Brownlee's affidavit. The first is that the property was less valuable to the Crown in the absence of insurance and EQC cover for the land. The second was precedent value: the Crown did not wish to be expected to pay out in other natural disasters, given that they occur "relatively frequently".⁵⁵ Both of these

⁵³ See for example Sutton COA 2:18 at [13] – [16].

⁵⁴ According to Minister Brownlee's press release of 13 September 2012 announcing the offers, the totals were: 50 uninsured residential properties, 6 insured houses on leasehold land, 65 parcels of vacant land and 22 insured commercial/industrial buildings (COA 6:248), out of the "over 7,400 properties" in the red zone referred to in the Recovery Strategy (COA 5:184 at page 39).

⁵⁵ Brownlee COA 2:27 at [76].

reasons are obviously focussed on the Crown's perspective, and do not consider the interests of the home owners directly affected by the decision. The third reason is "fairness" which Minister Brownlee places in the context of both those who won't be compensated in future natural disasters and the insured home owners in the red zone.⁵⁶ This reason also is not related to the interests of the home owners affected by the decision.

64. The Cabinet Paper of 31 August 2012 itself records a slightly different explanation. It states that there are three "good reasons" why uninsured properties should not receive an offer on the same terms as insured properties:⁵⁷

it would compensate for uninsured damage;

it would be unfair to other red zone property owners who have been paying insurance premiums;

it creates a moral hazard in that the incentives to insure in the future are potentially eroded.

65. There is no discussion in this Paper about the position of the uninsured home owners, in terms of their options of obtaining affordable housing outside the red-zone area or the situation that they will face if they remain. There is also no discussion of supporting people to leave the red zone or of the social implications of the decision, and there are no proposals for on-going support and communication arrangements, which were a feature of the June 2011 Cabinet Memorandum. There has in fact been a change in the language between the two papers: the August 2012 paper makes no reference to people, or to homes or home owners. There discussion is only of "properties", leaving the reader to assume that home owners fall within the category of "uninsured improved properties".

66. Aside from the apparent lack of consideration of the impact of the decisions on the home owners affected, there is in any event a real issue as to whether the concerns expressed provide a reasonable and proportionate rationale for the difference in treatment between the two groups of home owners. In particular:

- 66.1. The offers to insured home owners approved in June 2011 were primarily designed to support residents into new housing, away from the worst affected areas. That consideration applies equally to uninsured home owners, and is not affected by their insurance status.

⁵⁶ COA 2:27 at [77] – [78].
⁵⁷ COA 6:241 at [5].

- 66.2. Recovery of a significant part of the home owner’s equity (which was considered to be of key importance to the June 2011 decision)⁵⁸ is likely to be a significant factor in the affordability of alternative housing. This is equally true for uninsured as for insured home owners.
- 66.3. The level of assistance that this group may require is not dependant on whether or not they have insurance. If anything, the opposite inference might be drawn that in some areas at least, lack of insurance cover may reflect financial hardship or a lack of commercial sophistication.
- 66.4. It is not clear what steps were taken to test the assumption initially expressed in the June 2011 that failure to hold current insurance results from a deliberate and informed assumption of risk.
- 66.5. The “precedent” and “moral hazard” arguments bear little weight given the extraordinary circumstances of the residential red zones (which are unlikely to be repeated “relatively frequently”), and the very small number of affected uninsured owners in those zones.⁵⁹
- 66.6. It is not clear what steps may have been taken to test whether and to what extent insured home owners in the red zones would consider that it would be unfair if their neighbours received a higher level of assistance in relative terms to attain the same opportunity to relocate out of the area.
- 67. The treatment of uninsured home owners also contrasts with the decisions made in relation to owners of properties with dwellings under construction, and not-for-profit organisations. The offer made to insured home owners was extended effectively in full to these groups following decisions made in June 2012, on the basis that these owners could not have obtained insurance for the land component of their properties.⁶⁰ The absence of EQC cover to off-set the purchase price appears not to have been a concern. Rather, there is a suggestion that uninsured home owners are not deserving of a better offer: see for example in the 23 May 2013 CERA paper:⁶¹

⁵⁸ COA 4:120 at [58].

⁵⁹ See for example the recommendation by CERA in its “initial thinking” paper of 10 April 2012 COA 5:181 at [5].

⁶⁰ Cabinet Minute 5 June 2012 and supporting paper, COA 5:195; CERA paper 23 May 2012, COA 5:189.

⁶¹ COA 5:189 at [40].

Non-residential not-for-profit organisations in the red zones are able to get building insurance, but as this insurance is non residential it does not extend to land cover. By being insured, not-for-profit property owners did all that they could to protect their properties in the event of a disaster.

68. The obvious impact of a significantly lower offer to uninsured home owners is that some or all of this group will not have the same option as insured home owners to leave the area. This group therefore faces a greater risk of being forced for financial reasons to remain in what is clearly becoming inadequate housing conditions under any criteria. Mr Sutton describes problems with an increase in crime and squalor, the safety risk posed by abandoned houses, fires in unoccupied properties, the large increase in rodents and problems with looting.⁶² The conditions are apparently only likely to deteriorate further as more residents leave and services and infrastructure are not maintained or withdrawn.⁶³
69. The impact of treating this group of home owners differently from the majority is significant. It appears to be disproportionate to its stated objectives of fairness and concerns about setting a precedent, which are at best remote and not of pressing significance.
70. There is therefore a concern that the series of decisions creating the red zones, allowing services and infrastructure to be run down or not replaced, encouraging the relocation of large sections of the community while leaving this group in place, and offering this group significantly reduced support for relocation:
 - 70.1. may render the interference with the right to enjoy one's home arbitrary and disproportionate; and
 - 70.2. amounts to an unjustified retrogressive step in the protection of the right to adequate housing.
71. The Crown in submissions appears to consider that the relevant decisions simply do not engage any relevant rights (submissions [10.1] – [10.3]). This is consistent with the 31 August 2012 Cabinet Paper which also reflects an absence of consideration of how the reduced offer (with the consequent impact on the viable

⁶² COA 2:18 at [13] – [16]. See also the November 2012 “supporting information” sent to owners, confirming at page 5 that new services won’t be installed, that current services may not be maintained, and that insurers may refuse to insure properties in the red zone: COA 6: 264.

⁶³ See also by way of example the CERA paper of 17 December 2012 COA 6:271 at [48.3] describing: “the increasingly bleak environment of the RRZ (from a residential and health and wellbeing perspective), as the majority of properties are vacated and demolitions and clearances proceed apace.”

options for relocation away from degenerating neighbourhoods) would affect the rights and interests of the home owners concerned.

72. By failing to recognise that the decisions engage rights under ICCPR and ICESCR, the government appears to have precluded a proper consideration of the impact of its decisions on the rights of the people directly affected, and on New Zealand's compliance with its international human rights obligations.

Owners of vacant land and commercial properties

73. It is less straight forward to assess the extent to which New Zealand's international human rights obligations are engaged in the decisions relating to vacant land and commercial properties.
74. As noted above, the right against arbitrary or unlawful interference in art 17 of the ICCPR can extend not only to places where people reside, but also to where people carry out their usual occupation.⁶⁴ It appears that most of the commercial properties affected are small owner-operated businesses serving the local community, such as corner stores,⁶⁵ which will be significantly affected by the relocation of the local communities. It is not clear how many of these businesses are run by local residents, or what affect the reduced offer may have on their ability to relocate away from the area.
75. Similarly, it is not clear how the decisions relating to vacant land which may be held by residents would affect the ability of residents to relocate. To the extent that the decisions do directly affect residents, similar concerns to those outlined above for uninsured property owners would apply.
76. For owners of commercial property and vacant land who themselves reside outside the residential red zones, the impact of the reduced offers is purely economic. The rights to housing and home are not engaged by the decisions affecting them, and the critical concerns with the increasing inadequacy of housing in the red zones are also not relevant.
77. There are also issues raised with the right to property set out in the UDHR, which would apply to these owners as well as any other land owners in the red zone. As noted above, art 17 provides:

⁶⁴ General Comment 16 at [5].
⁶⁵ COA 5:39 at [39].

- (1) Everyone has the right to own property alone as well as in association with others.
- (2) No one shall be arbitrarily deprived of his property.
78. The Commission agrees that if the declaration is read narrowly (noting that the IASC Guidelines advocate a broad approach to protecting rights to property in the context of responding to natural disasters),⁶⁶ then the term “deprived of property” would exclude anything short of a “taking”, and that by itself the creation of the residential red zone does not constitute a taking.⁶⁷ The Commission however notes that even on that basis the following issues arise:
- 78.1. If the government pursues the option of compulsory acquisition of properties in the red zones then the fact they are red zone properties will obviously be an important factor in justifying the purchases.
- 78.2. The decisions creating the residential red zones, and the more detailed decisions which led to the inclusion of individual properties within the boundary of the zones, will therefore be relevant to an assessment of whether the compulsory acquisition is not arbitrary under the provisions of art 17, in other words whether it is reasonable, proportionate and consistent with the UDHR.
- 78.3. The availability and adequacy of procedural protections for affected land owners will be relevant to that assessment, and the apparent lack of engagement with affected land owners before these decisions were made, combined with the absence of a process to challenge them once made, would raise some concern.
79. The severance of the underlying red zone decisions from the processes and protections of the CER Act (and in particular the platform for domestic enforcement of human rights) raises a concern that those matters will not be adequately addressed in subsequent compulsory acquisition decisions. Given the passage of time there must also be a real issue that in practical terms it may be simply too late to review the justification for the acquisitions by reference to the red zone decisions.

⁶⁶ See [35] above. Noting also that a broader approach to the right to property is taken in other jurisdictions, for example in the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, art 1, which includes as part of the right to property freedom from unjustified interference or control of use. See for example *Antonetto v Italy* (2003) 36 EHRR 10 (English version); *Katte Klitsche de la Grange v Italy* (1994) 19 EHRR 368.

⁶⁷ As discussed for example by the Supreme Court in *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112; [2007] 2 NZLR 149 at [43] – [53].

80. These concerns further reinforce the Commission's position set out above, that it would have been more consistent with New Zealand's international human rights obligations for the residential red zone decisions to have been taken and implemented under the CER Act, rather than by executive process, so that appropriate protections and consideration of the human rights implications would be provided for at the time that these key decisions were made.

Date: 14 October 2013



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List of authorities

Legislation and related material

1. Canterbury Earthquake Recovery Act 2011 – s3, Part 2, Part 3
2. Canterbury Earthquake Recovery Bill 286-1, Explanatory note
3. Minister's First Reading Speech, 671 NZPD, 17898
4. Magna Carta, chapter 29; Imperial Laws Application Act 1988, s 3(1)

Cases

5. *Ye v Minister of Immigration* [2009] NZSC 76; [2010] 1 NZLR 104
6. *Tavita v Minister of Immigration* [1994] 2 NZLR 257 at 265 – 266
7. *Winther v Housing New Zealand* [2010] NZCA 601; [2011] 1 NZLR 843 at [74]
8. *CPAG v AG* [2013] NZCA 402
9. *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112; [2007] 2 NZLR 149
10. *R v North & East Devon District Health Authority ex p Coughlan* [2001] QB 213; [2000] 3 All ER 850
11. *Connors v United Kingdom*, (2004) 16 BHRC 639
12. *Gilllow v United Kingdom*, (1989) 11 EHRR 335
13. *Chapman v United Kingdom* (2001) 33 EHRR 399
14. *Howard v United Kingdom*, Application no.10825/84, ECtHR, 18 October 1985
15. *Antonetto v Italy* (2003) 36 EHRR 10
16. *Katte Klitsche de la Grange v Italy* (1994) 19 EHRR 368
17. *Mohammed Sahid v. New Zealand*, CCPR/C/77/D/893/1999 (11 April 2003)
18. *Toonen v Australia* No. 488/92, U.N. Doc CCPR/C/50/D/488/1992 (1994)

International Material

19. UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), arts 12 and 17
20. International Covenant on Civil and Political Rights 999 UNTS 171 (adopted 16 December 1966, entered into force 23 March 1976), arts 2, 4, 12, 17, 19, 25
21. International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (signed 16 December 1966, entered into force 3 January 1976), arts. 2,4, 11
22. European Convention on Human Rights, art. 8
23. World Conference on Human Rights in Vienna, Vienna Declaration and Programme of Action UN Doc A/ CONF.157/23, 12 July 1993. (at 5) (endorsed by General Assembly Resolution 48/121)

24. United Nations Committee on Economic, Social and Cultural Rights, General Comment No.3. *The Nature of States Parties* (1990)
25. United Nations Committee on Economic, Social and Cultural Rights, General Comment No.4. *The right to adequate housing* (1991)
26. United Nations Committee on Economic, Social and Cultural Rights, General Comment No.7 *The right to adequate housing: forced eviction* (1997)
27. United Nations Human Rights Committee, General Comment No. 16: *The right to respect of privacy, family, home and correspondence, and protection of honour and reputation* (1988)
28. Annotations on the text of the draft International Covenants on Human Rights, 1/7/95 UN Doc. A/2929 at [197], [202] and [206]
29. Inter-Agency Standing Committee, *Human Rights and Natural Disasters. Operational Guidelines and Field Manual on Human Rights Protection in Situations of Natural Disaster*, January 2011
30. List of issues to be taken up in connection with the consideration of the fifth periodic report considering New Zealand's obligations under the ICCPR, CCPR/C/NZL/Q/5, 24 August 2009
31. List of issues to be taken up in connection with the consideration of New Zealand's third periodic report considering New Zealand's obligations under ICESCR, E/C.12/NZL/Q/3, 14 June 2011
32. Concluding observations from the Committee on Economic, Social and Cultural Rights in response to New Zealand's third period report considering New Zealand's obligations under ICESCR, E/C.12/NZL/CO/3, 18 May 2012
33. New Zealand's third periodic report considering New Zealand's obligations under the ICESCR, E/C.12/NZL/3, 17 January 2011
34. Response to the Human Rights Council to the recommendations of the working group on the universal periodic review A/HRC/12/8/Add.1, 7 July 2009
35. Reply to the list of issues to be taken up in connection with the consideration of the fifth periodic report of New Zealand considering New Zealand's obligations under the ICCPR, CCPR/C/NZL/Q/5/Add.1 5 January 2010
36. Reply to the list of issues to be taken up in connection with the consideration of New Zealand's third periodic report considering New Zealand's obligations under ICESCR, E/C.12/NZL/Q/3/Add.1 26 January 2012
37. Ministry of Foreign Affairs and Trade, Draft New Zealand National UPR Report (2013)