

ENGINEERING NEW ZEALAND FACILITATION SERVICE

CANTERBURY CLAIMS RESOLUTION

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INTRODUCTION

CONTEXT

Engineers play a key role in the resolution of earthquake insurance claims. They are responsible for identifying earthquake damage to a property and recommending a methodology that will reinstate that damaged element to the required standard.

However, engineering assessments of earthquake damage are complex and require significant professional judgment. Different engineers commonly produce differing assessments and reinstatement methodologies.

Most differences of opinion are created by different engineers having different briefs from their clients. Ideally when there are differences of opinion between engineers, those engineers will work together to resolve the issues. However, differences of opinion tend to occur in the context of a disputed insurance claim, which often puts the engineers on different sides of a complicated dispute.

In these cases, navigating two different engineering assessments and recommendations can be time-consuming, costly, stressful and erode relationships and trust. Claims can get stuck and result in litigation.

ENGINEERING NEW ZEALAND FACILITATION SERVICE

Engineering New Zealand's facilitation service allows engineers for homeowners and engineers for insurers who have different damage assessments and reinstatement recommendations to have a conversation about those assessments and recommendations.

The purpose of the conversation is for the engineers to better understand any differences in their professional opinions, and to provide clarity and understanding for their clients. Better understanding of differences in engineering opinion helps the engineers' clients move forward with resolving the claim.

The service is a structured and open conversation guided by an independent facilitator to:

- clarify the instructions or application of the relevant documentation that each engineer is operating to;
- identify if and where the engineers' opinions are aligned on what the damage is and what the reinstatement options are; and
- (if the engineers' professional opinions are not aligned), produce an outcome statement setting out the areas of agreement and disagreement, with an explanation for any differences, and suggested next steps to resolve outstanding engineering issues.

In this model, even if the engineers' professional opinions are not aligned, the clients have a statement of the areas of agreement and disagreement that they can use to better understand the differences between their engineers' professional opinions. This statement would help them take the next steps that may be necessary to move forward with the claim.

WHAT IS FACILITATION?

Facilitation is a process where a neutral third party helps the parties to better understand each other and their views, with the intention of avoiding or resolving disputes.

It is different from arbitration or expert determination, where a neutral third party imposes a determination on the parties. It is a voluntary process that observes confidentiality.

GENERAL PRINCIPLES

NATURE OF INVOLVEMENT

The service is for engineers to work through their assessments and findings, and to clarify where their professional opinions are aligned, where they are not and why. It is a process by which the engineers discuss their professional opinions of damage and reinstatement based on evidence; it is not a process for negotiating a joint view that binds their clients.

To be successful, this process needs to occur between engineers, as a professional and technical conversation. Neither the engineers' clients nor their clients' lawyers may participate in the facilitation.

To support openness and transparency, the facilitator speaks with the homeowner or their representative both before and after the facilitation and the homeowner can provide the facilitator with questions they want explored at the facilitation. In addition, the engineers are expected to provide their clients with a summary of the meeting, and the outcome statement.

Involvement in the process is voluntary. The clients may withdraw their engineers from the facilitation process at any time.

CONFIDENTIALITY

All parties (the facilitator, the engineers and their clients) must observe and maintain confidentiality of all information, including conversations, provided for the purposes of the facilitation.

The meetings will be conducted in confidence. The meeting outcome will be shared with the engineers' clients but can only be disclosed to other persons with the agreement of the engineers and their clients (except as provided for below).

SUBSEQUENT PROCEEDINGS

It is not expected that the engineers will make any decision or recommendation during the facilitation. However, for the avoidance of doubt, the engineers' clients will not be bound to any decision or recommendation made by their engineer during the facilitation.

However, any statement made and signed by the engineers at the end of the facilitation setting out their independent and objective professional engineering opinion relating to earthquake damage and reinstatement, including areas of agreement and disagreement, may be referred to by the parties in any other processes for the purposes of resolving the claim.

The facilitator cannot be called as either a witness or expert in any subsequent proceedings concerning the matter being facilitated.

COSTS

For a facilitation referred to Engineering New Zealand by the GCCRS, the facilitator's time is paid for by the GCCRS. GCCRS then on charge the insurer. The homeowner and the insurer pay for their own engineer's time to attend the facilitation (expected to be around 4 hours).

ROLE OF THE FACILITATOR

The facilitators are experienced Chartered Professional Engineers with extensive technical knowledge and experience in earthquake assessments and reinstatement methodologies. They are trained in facilitation and mediation techniques.

WHAT THE FACILITATOR IS

The role of the facilitator is to guide the technical discussions between the engineers.

Facilitators:

- are impartial;
- are responsible for the process, but not the outcome;
- facilitate communication;
- help the parties hear and understand each other, and their differences;
- help the parties develop and evaluate options and alternatives.

WHAT THE FACILITATOR IS NOT

The role of the facilitator is not to carry out their own comprehensive assessment or provide a peer review.

Facilitators will not:

- make decisions to resolve the issues;
- give advice;
- state an opinion;
- provide a determination or make any recommendations (binding or non-binding) at the completion of the facilitation meeting.

ELIGIBILITY FOR FACILITATION

Before a facilitation can take place, engineers should have met and tried to reach agreement on any points of difference themselves.

PROCEDURE :: BEFORE THE FACILITATION

REFERRAL TO FACILITATION

Engineers may be referred to Engineering New Zealand's facilitation service by the GCCRS, or their clients may ask them to participate.

Once Engineering New Zealand receives a request for facilitation, it will:

- Contact the parties or their representatives to confirm the referral;
- Appoint a facilitator;

- Send an information pack and pre-agreement to the parties (the engineers, their clients and the facilitator) for signing;
- Provide the facilitator and the engineers the documentation that was included with the referral; and
- Arrange a time and location for the facilitation to take place via the GCCRS.

PRE-AGREEMENT

A pre-agreement will be signed by the clients, engineers and the facilitator. The pre-agreement will cover:

- the engineers present;
- the rules of the facilitation meeting;
- the timetable;
- the requirement for confidentiality;
- the responsibilities of the facilitator (including liability).

APPOINTMENT OF FACILITATOR

The facilitators will be drawn from a panel of engineering experts administered by Engineering New Zealand. Engineering New Zealand will appoint approved and recognised engineers who are experienced in post-earthquake building assessments. This panel of engineers will have been trained by Engineering New Zealand in the principles of facilitation.

PREPARATION

Engineering New Zealand will provide the facilitator and the engineers with the engineers' reports and any other relevant documentation. The facilitator and the engineers will read the reports and identify key issues for discussion at the facilitated meeting.

The facilitator may contact the engineers to the facilitation to introduce themselves, agree the key elements for discussion at the facilitated meeting and answer any questions the engineers have about the process.

The facilitator will also contact the homeowner or their representative prior to the facilitation to introduce themselves, explain the process and identify any key issues or questions the homeowner wants to be covered at the facilitation.

CONFLICT OF INTEREST

The facilitation process will be carried out in an impartial, independent and non-biased (either real or perceived) manner. The test for bias is whether there is any risk, or perceivable risk, that the facilitator might unfairly regard with favour or disfavour any party involved in the process.

For this reason, the facilitator must declare any possible conflict of interest with any of the engineers or clients involved in the process.

If any of the parties involved raise objections to the appointment of a particular facilitator, including where a perceived or actual conflict is identified, Engineering New Zealand will provide a recommendation for another facilitator.

TROUBLESHOOTING

Early resolution

Following an initial assessment, if the facilitator considers that resolution may be better achieved in some other way, the facilitator may contact the engineers and make a recommendation for resolution. The engineers will discuss that recommendation with their clients.

Further information needed

If the facilitator identifies that further information is needed prior to the facilitation, the facilitator may ask Engineering New Zealand to gather that information.

Competence issues

If the facilitator identifies any significant technical issues with an engineer's assessment, the facilitator may contact Engineering New Zealand for advice.

PARTIES PRESENT

Only the named engineers are entitled to attend the facilitation.

TIMEFRAMES

The facilitator will start the facilitation process as soon as possible after the pre-agreements have been signed by the parties, with the view to completing the process i.e. issuing an outcome statement to the engineers' clients, within 28 days.

ADMINISTRATIVE SUPPORT

Engineering New Zealand will provide the following support for the service:

- assessment and management of all applications for the service;
- liaison between the parties and engineers regarding the service;
- allocation of appropriate facilitator(s);
- the development and upkeep of all templates (including pre-agreements and outcome statements);
- administrative support (including coordinating and organising the facilitated meeting and associated travel).

PROCEDURE :: DURING THE FACILITATION

FACILITATION MEETING

The facilitator will guide the conversation and facilitate the meeting with the goal of clearly identifying where the engineers' professional opinions on damage and reinstatement are aligned and where they are not aligned.

The process should always be flexible, depending on the issues and the differences in opinion between the respective engineers.

A general structure is:

1. opening;

2. initial statement from each engineer;
3. agenda setting;
4. exploring the issues;
5. agreeing an outcome statement.

OPENING

The facilitator opens the meeting. The purpose of the opening is to ensure that the engineers are comfortable, understand the process and the potential outcomes.

When opening the meeting the facilitator should:

- explain the process;
- explain the role of the facilitator;
- discuss the voluntary nature of participation, confidentiality, and the possibility for private sessions;
- outline key elements to be discussed, that were identified by the engineers as points of difference.

INITIAL STATEMENTS

Each engineer will be invited to present their perspective of the key elements to be discussed. The purpose is to demonstrate their findings and key conclusions and ensure that all the information is 'out on the table'. The facilitator should:

- encourage the engineers to be succinct, focus on the key elements;
- invite both engineers to present, without interruption (including from the facilitator) – there will be time for questions and discussion later;
- after each engineer has finished, it is often useful for the facilitator to summarise what they have heard to check their understanding.

AGENDA SETTING

From what they have heard (and read in advance), the facilitator should confirm the key areas where the engineers' professional opinions are aligned and where they are not, to provide an agenda for discussion.

It is appropriate for the facilitator to take the lead but it is important to ask the engineers if they have anything to add to the agenda, to ensure their agreement to the agenda.

If necessary, the facilitator should:

- reframe areas of disagreement in a neutral way.
- Set priorities for discussion (for example, are some issues dependent on others?).

EXPLORING THE ISSUES

This process is primarily an exercise in ensuring there is a full understanding of the bases for the assessments. It involves testing assumptions and their downstream effects.

The facilitator has two key roles during this stage of the process:

1. to act as an impartial 'referee' of the discussion between the engineers.
2. to be a catalyst for ensuring issues are fully explored, guiding the discussion in ways to identify areas of alignment and misalignment.

Private sessions

Private sessions are confidential meetings between the facilitator and one of the engineers. Any engineer may request a private session with the facilitator at any time, and the facilitator will decide whether it is appropriate.

It is unlikely that a private session would be used in this scenario but could be useful if a particularly sensitive or challenging issue arises.

OUTCOMES

At the completion of the facilitated meeting, the engineers will put together a statement reflecting the outcome of the facilitation (the outcome statement). The outcome statement will be signed and agreed to at the facilitation meeting. The outcome statement will be shared with the engineers' clients and may be referred to by the parties in any other processes for the purpose of resolving the claim.

Agreement

If the engineers' professional opinions are found to be aligned, the facilitator will put together an outcome statement, signed by both engineers, outlining the engineers' agreed professional opinions on earthquake damage and the agreed reinstatement methodology.

No agreement

If the engineers' professional opinions are found to be misaligned, or aligned only in part, the engineers, with assistance from the facilitator, will draft an outcome statement covering:

- points of alignment
- areas of disagreement;
- reasons for disagreement;
- proposed next steps, such as recommending further investigations or an independent peer review.

Things to consider on the areas of disagreement:

- are they differences of fact? If so, can they be investigated and resolved?
- are they differences of opinion? If so, how are they best presented?
- are they engineering issues or legal and policy issues?
- how should they be documented? Are there issues about disclosure or confidentiality?

FEEDBACK TO HOMEOWNER

The facilitator will call the homeowner or their representative to discuss the facilitation and the outcome statement.