

The Treasury

Treasury Advice Related to Modernising the EQC Act Information Release

December 2021

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Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

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- [25] 9(2)(b)(ii) - to protect the commercial position of the person who supplied the information or who is the subject of the information
- [26] 9(2)(ba)(i) - to protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied
- [27] 9(2)(ba)(ii) - to protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information would be likely otherwise to damage the public interest
- [33] 9(2)(f)(iv) - to maintain the current constitutional conventions protecting the confidentiality of advice tendered by ministers and officials
- [34] 9(2)(g)(i) - to maintain the effective conduct of public affairs through the free and frank expression of opinions
- [35] 9(2)(g)(ii) - to maintain the effective conduct of public affairs through protecting ministers, members of government organisations, officers and employees from improper pressure or harassment
- [38] 9(2)(j) - to enable the Crown to negotiate without disadvantage or prejudice
- [39] 9(2)(k) - to prevent the disclosure of official information for improper gain or improper advantage

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Treasury Report: Modernising the Earthquake Commission Act: Offence for non-payment of levies

Date:	20 January 2021	Report No:	T2020/3777
		File Number:	TY-2-1-17

Action sought

	Action sought	Deadline
Hon Grant Robertson Minister of Finance	None	N/A
Hon Dr David Clark Minister Responsible for the Earthquake Commission	<p>Note the information requested relating to penalties in comparative regulatory regimes and the value of levies collected.</p> <p>Agree to the recommended maximum penalties for deliberate non-payment of levies and non-compliance with associated obligations.</p>	1 February 2021

Contact for telephone discussion (if required)

Name	Position	Telephone	1st Contact
Elizabeth Bolton	Senior Analyst, Earthquake Commission Policy Team	[39]	N/A (mob) ✓
Helen McDonald	Manager, Earthquake Commission Policy Team	[35]	

Minister's Office actions (if required)

Return the signed report to Treasury.

Note any feedback on the quality of the report

Treasury Report: Modernising the Earthquake Commission Act: Offence for non-payment of levies

Executive Summary

This report provides the additional information you requested at your meeting with the Treasury on 10 December 2020 (T2020/2491 refers). This includes information on penalties in comparative regimes, and the size of the transactions involved when levies are paid by insurers to the Earthquake Commission (EQC).

Recommended Action

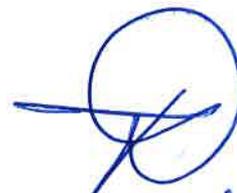
We recommend that you:

- a **note** that you previously agreed that there will be a new offence for deliberate breaches of the obligation on insurance companies to pay EQC levies collected on its behalf within a specified period, to support the existing obligation for officers or agents of the insurance companies to certify that the payment is correct (T2020/2491 refers)
- b **note** that the new offence will apply to both the deliberate non-payment of the levy, and non-compliance with the associated obligations relating to the accompanying certificate
- c **note** that on 10 December 2020 you requested that officials provide further information on comparative regimes and the size of the transactions involved
- d **note** that in the 2019/2020 financial year EQC received approximately \$446 million in levy revenue
- e **agree** to a maximum penalty of \$25,000 for individuals and \$50,000 for body corporates for the new offence for non-payment of levies and non-compliance with the associated obligations to certify that the payment is correct

Agree/disagree.

or ~~and~~ a term of imprisonment not exceeding two months

Helen McDonald
Manager, Earthquake Commission Policy Team



*David Clark
Minister responsible for the EQC.*

Treasury Report: Modernising the Earthquake Commission Act: Offence for non-payment of levies

Purpose of Report

1. In November 2020 we provided advice on a number of proposed changes to the Earthquake Commission Act 1993 (the EQC Act) to improve the handling and settlement of claims (T2020/2491 refers).
2. The purpose of this report is to provide you with the additional information you requested at your meeting with the Treasury on 10 December 2020 to discuss this advice. This includes information on penalties in comparative regimes, and the size of the transactions involved when levies are paid by insurers to the EQC.

Analysis

3. You have agreed to a new offence for deliberate breaches of the obligation on insurance companies to pay EQC levies collected on its behalf within a specified period, to support the existing obligation for officers or agents of the insurance companies to certify that the payment is correct (T2020/2491 refers).
4. We recommended maximum penalties for a breach of the obligation of \$50,000 for body corporates and \$25,000 for individuals.
5. You have requested further information on how the proposed penalties compare to penalties in comparable regulatory regimes and the size of the transactions involved.

The obligation to pay premiums

6. The EQC scheme is funded by compulsory premiums (levies) paid by property owners with fire insurance policies. Levies are paid to insurers who then pass the levy on to EQC. Section 24(1) of the EQC Act requires insurance companies to pay levies within two months after the end of the month on which they are due. Levies are, therefore, fundamental to the design of the scheme. If there were significant failures to pass on the levy, the risk of EQC needing to call on the Crown guarantee increases. In addition, the levy is collected on a compulsory basis with the expectation that it will be passed to EQC. Where insurers retain the levy inadvertently or deliberately, they obtain the benefit of access to this money at the expense of EQC.
7. In addition, section 24(2) requires payments to be accompanied by a certificate from an officer or agent of the insurer stating that the payment is correct. This requirement places the onus on insurers and their officers and agents to ensure that levy payments are accurate. It also provides assurance to EQC that the payments reflect the levies collected on its behalf.
8. The Treasury and EQC currently have limited information on levels of compliance with these obligations. Non-payments tend to be self-reported by insurers. Under the National Disaster Response Agreement and related data sharing agreements, EQC will have greater access to information on the numbers of property owners who have paid the EQC premium. This will provide EQC with an enhanced ability to assess compliance with levy obligations as it will have a much better understanding of the payments it should be receiving from insurers.
9. We have recommended and you have agreed to an offence for deliberate non-compliance with the levy related obligations. Taking into account the harm to public and

private interests resulting from a failure to pass on the levy, and the fact that this harm is foreseeable and could be avoided by insurers, an offence with a *mens rea*¹ element is considered appropriate. This would have the benefit of only penalising insurers where the behaviour was deliberate. In addition, we anticipate that it would maintain the current position in relation to self-reporting, as action would only be considered to be an offence where the behaviour is deliberate, and insurers would not otherwise incur financial penalties.

Size of transactions involved

10. Insurers and other intermediaries paid approximately \$446 million in premiums to EQC in the 2019/2020 financial year.² This is spread across the 10 main insurers, along with other smaller insurers. The share of the levy paid should largely correlate to market share. For example, an insurer with 25% of the market would have paid approximately \$111.5 million, an insurer with 15% of the market would have paid approximately \$66.9 million, and an insurer with 5% of the market would have paid \$22.3 million over that period.
11. The \$446 million figure includes deductions made by insurers pursuant to the EQC Act rebate. The rebate provisions provide EQC with a discretion to allow insurers to retain a percentage of premiums payable to EQC. EQC currently exercises this discretion to allow insurers to retain 2.5% of premiums paid. We will shortly provide you with advice along with other technical issues, recommending that if the discounting option is retained, that the EQC Act set out the parameters within which a discount can be provided.
12. The size of the transactions suggests that non-compliance has the potential to be associated with significant financial implications for the Natural Disaster Fund and EQC's operations.

Penalties for deliberate non-payment of levies and associated obligations in other regimes

13. The Legislative Design Advisory Committee (LDAC) guidance notes that the purpose of criminalising behaviour is to punish, deter, and publicly denounce conduct that is considered blameworthy and harmful.³ A criminal conviction reflects poorly on the convicted party or parties and has the potential to result in negative publicity. It may also have wider consequences for participation in and compliance with other regulatory regimes, for example, where the entity or individuals need to be licenced and/or are subject to fit and proper person requirements. This in itself should provide a deterrent and act as a public denouncement of the conduct, along with demonstrating that the conduct is blameworthy and harmful.
14. LDAC also advises that the “maximum penalty should not be disproportionately severe, but should reflect the worst case of possible offending”.⁴ There is a risk that if the penalty is set too low, it may not be a sufficient deterrent to deliberate behaviour by insurers and their officers and agents.
15. In our November advice we proposed a maximum financial penalty of \$25,000 for individuals and \$50,000 for body corporates. A comparison with offences and penalties relating to the payment of levies in the Fire and Emergency Act 2017 (FENZ Act), Customs and Excise Act 2018 (Customs Act) and Accident Compensation Act 2001 (ACC Act) is set out below in Table One. In addition, the highest maximum penalty for non-payment of levies was located in the Broadcasting Act 1989.

¹ A *mens rea* offence is one where the person committing the offence intends to do the prohibited act or had knowledge of it.

² EQC Annual Report 2019/2020, p 84.

³ LDAC, Legislation Guidelines: 2018 edition, p 111.

⁴ LDAC, Legislation Guidelines: 2018 edition, p 116.

Table One

	FENZ Act 2017	Customs and Excise Act 2018	ACC Act 2001	Broadcasting Act 1989
<p>Non-payment of levy or failure to provide levy returns</p> <p><u>Proposed penalties</u></p> <p>Individual: to a fine not exceeding \$25,000</p> <p>Body corporate: to a fine not exceeding \$50,000</p>	<p>Section 93(5) provides that it is an offence for a levy payer to not provide a return to FENZ for every month in which the levy payer entered into a contract of insurance where this is done knowingly and without reasonable excuse.</p> <p><u>Penalties</u></p> <p>Individual: to a term of imprisonment not exceeding 2 months or to a fine not exceeding \$25,000, or both</p> <p>Any other case: to a fine not exceeding \$50,000</p>	<p>Section 419 provides that it is an offence for a person to make a levy return that the person knows is false or misleading in a material particular.</p> <p><u>Penalties</u></p> <p>Individual: to a fine not exceeding \$10,000</p> <p>Body Corporate: to a fine not exceeding \$50,000.</p>	<p>Section 316 provides that it is an offence for employers, PAYE intermediaries and others to knowingly: not make deductions; use or permit the application of deductions for a different purpose than payment to ACC; provide false or misleading information in relation to a deduction; cause or attempt to cause another party from making a deduction; or obtain or attempt to obtain, for the person's own advantage or benefit, credit with respect to, or a payment of, the whole or any part of the amount of a deduction.</p> <p><u>Penalties</u></p> <p>Person using deductions for a different purpose: on each occasion the person is convicted, to imprisonment for a term not exceeding 5 years or a fine not exceeding \$50,000.</p> <p>Person for all other offences: the first time the person is convicted in relation to a particular type of offence, to a fine not exceeding \$25,000 and on every other occasion the person is convicted for the same type of offence, to a fine not exceeding \$50,000.</p>	<p>Section 30G provides that it is an offence to fail to provide a return and/or include the necessary information within the return within the specified period.</p> <p><u>Penalties</u></p> <p>Broadcaster: to a fine not exceeding \$100,000</p>

16. Taking into account the seriousness of the behaviour and the consequences, a maximum penalty of \$25,000 for individuals is considered appropriate. This is consistent with the maximum financial penalty for individuals in the FENZ Act, but greater than that in the Customs Act.
17. On balance, the proposed maximum penalty of \$50,000 for body corporates continues to appear appropriate. This is consistent with the maximum financial penalties for levy related offences in comparable regimes. For example, this is the maximum fine for a body corporate in the FENZ Act. Insurers also collect and pass on the FENZ levy, revenue from which was \$595.8 million for the 2019/2020 financial year. The only example located of a greater maximum fine for non-compliance with a levy related offence was in the Broadcasting Act 1989 (see Table One above).
18. While a maximum financial penalty of \$50,000 is potentially a small proportion of the levy amount in question, the negative implications of a criminal conviction will likely serve to deter deliberate breaches of the EQC Act obligations to a greater extent than a financial penalty.

'Use of Money Interest' (UOMI) regime

19. We considered a 'Use of Money Interest' (UOMI) regime instead of or in addition to an offence for non-payment of the levy. With a UOMI regime, interest starts to apply from the date the payment becomes late, regardless of the reasons for the lateness or incorrect payment. This means that even inadvertent failures to pay on time incur interest. UOMI regimes can address both under and over payments of levies resulting from day-to-day operations. They are intended to incentivise correct and timely payments.
20. This approach is taken by the Inland Revenue Department (IRD) to taxes and duties. Where people underpay, IRD charges interest and may also charge a penalty. Where people overpay, IRD refunds the money with interest. IRD reviews the amount of interest applied to under and over payments on a regular basis to ensure that they are in line with market interest rates. Section 154 of the Customs and Excise Act 2018 also provides for a UOMI regime in relation to late or incorrect payments of Customs duties.
21. A similar system has been provided for in the FENZ Act, albeit that this part of the legislation is not yet in force (levies are still subject to the 1975 legislation while the legislation is under review). The FENZ Act UOMI regime is accompanied by a number of 'shortfall penalties'. The changes introduced by the FENZ Act reflect a wider historic context of significant levy avoidance.⁵ We are unaware of significant deliberate avoidance of levies within the EQC regime.
22. On balance, a UOMI regime is unlikely to incentivise compliance with the obligation to pass on the EQC levy, could even have negative consequences, and may be difficult for EQC to implement. Based on the information currently available, the non-payment of the levy appears to be inadvertent and comes to the attention of EQC via self-reporting. Introducing a UOMI regime in an environment that appears to have good levels of compliance and self-reporting may be perceived as disproportionate to the nature of the harm. It could also deter self-reporting, at the expense of the Natural Disaster Fund. UOMI regimes also require systems that can readily calculate who has paid late, how late the payment is, and how much is outstanding in order to calculate how much interest is owing. Furthermore, these schemes are often supported by an appeal process which also requires an additional layer of process. EQC does not currently have systems that would enable it to readily make this assessment and run an appeal process where the amount owing is disputed.

⁵ [FSR-RIS Detailed-Policy-Design.pdf \(dia.govt.nz\)](#)

Other approaches to non-payment of levies

23. Non-payment of levies collected to fund other regimes may lead to other types of action with significant consequences. For example, non-payment of maritime levies can lead to the detention of ships under section 197 of the Maritime Transport Act 1994. Non-payment of oil pollution levies can lead to the withholding of Customs clearance under section 338 of the same Act. These penalties are likely to result in significant financial and wider commercial consequences for the affected parties. There are no equivalent means of punishing non-compliant parties under the EQC Act. EQC could withhold payments to claimants where the levy has not been passed on. This, however, would penalise the homeowner rather than the responsible party and does not align with the objectives of the current review.