

The Treasury

Treasury Advice Related to Modernising the EQC Act Information Release

December 2021

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Where this is the case, the relevant sections of the Act that would apply have been identified.

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

Key to sections of the Act under which information has been withheld:

- [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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TY-2-1-17

Date: 9 February 2021

To: Minister Responsible for the Earthquake Commission
(Hon Dr David Clark)

Aide Memoire: Information Requested Relating to Proposed New Offence

This Aide Memoire provides the further information you requested in relation to the proposed new offence relating to Earthquake Commission (EQC) levies. The information you sought includes information on whether imprisonment is an appropriate penalty, noting it is a feature in the Accident Compensation Act 2001 (ACC Act) regime. In addition, you requested further information on when an audit might be undertaken.

The proposed offence

The proposed offence relates to two obligations located in section 24 of the Earthquake Commission Act 1993 (EQC Act) that require:

- insurance companies to pay EQC premiums (levies) within two months from the end of the month in which the private insurance contract, that EQC cover attaches to, is made; and
- the payment to be accompanied by a certificate signed by an officer or agent of the company stating that according to the books of the company, and to the best of his or her knowledge and belief, the payment is correct.

A term of imprisonment

Advice from the Legislative Design Advisory Committee (LDAC) is that the “maximum penalty should not be disproportionately severe, but should reflect the worst possible case of offending”. Similarly, advice from the Ministry of Justice is that penalties “should be commensurate to the harm caused and culpability (or moral blameworthiness) of the conduct”.

Imprisonment is a significant deprivation of liberty and may be appropriate where the offence includes a high *mens rea*¹ standard. A term of imprisonment will be inappropriate, for example, where the offence is strict liability. The proposed offence relating to non-compliance with section 24 of the EQC Act will be a *mens rea* offence based on intent. The individual element of the offence involves deliberate non-compliance with the obligation to provide a certificate signed by an officer or agent of the company attesting to the correctness of the payment. The insurer (body corporate) element of the offence (non-payment of the levy) also requires a deliberate action. Given, the body corporate itself cannot be sentenced to a term of imprisonment, this would require the sentence to be imposed on the insurance company directors.

There are some examples in other legislative regimes of imprisonment being used as the penalty for non-payment of a tax or levy. The ACC Act provides for a term of imprisonment of up to five years where an offender uses levy deductions for a different purpose. Accident Compensation Corporation (ACC) earner levies are collected by the Inland Revenue Department in a similar manner to general taxation. The term of imprisonment aligns with the maximum term of imprisonment in section 143A of the Tax Administration Act 1994 (a range of intentional behaviour including not keeping documents required to be kept by a tax law and not making deductions), and section 143B (evasion or similar behaviour). The alignment between the two regimes likely reflects the similar manner in which the money is collected and potential types of non-compliance that individuals, particularly self-employed individuals may engage in.

The Fire and Emergency Act 2017 (FENZ Act) also provides for a term of imprisonment for up to two months where the person deliberately fails to provide a levy return, in addition to financial penalties. We are proposing the same maximum financial penalties for the proposed new offence as that applied to the offence relating to levy returns in the FENZ Act. The FENZ Act is a useful point of comparison as, like EQC levies, insurers act as intermediaries in relation to Fire and Emergency New Zealand (FENZ) levies.

A term of imprisonment would provide alignment with the FENZ Act and the other regimes noted above. Alignment of penalties across legislation is consistent with Ministry of Justice advice that policy makers should ensure that sanctions are set at similar levels to other like offending so that roughly the same sanctions apply regardless of the sector. On balance, however, we think the consequences of a criminal conviction and the financial penalties are likely to be sufficient deterrents for non-compliance with levy obligations in this instance. ^[34]

Audits of levy payers

Under the arrangements EQC has negotiated with insurers as part of the National Disaster Response Agreement (NDRA), it has been agreed that EQC will be able to

¹ Where the person committing the offence intends to do the prohibited act or had knowledge of it.

undertake audits and assurance reviews every quarter for the first 12 months of the contract. Following this, audits will take place on an annual basis. The NDRA will also provide EQC with more access to information as part of the data sharing agreement in the NDRA.

In addition, the EQC Act provides that EQC may inspect, examine and require the production of a range of information. The EQC Act also provides for the making of regulations that provide for the audit and investigation of records, books and accounts required to be kept by the EQC Act or by regulations in force under the EQC Act. There are currently no regulations in force that have been made under this regulation-making power.

Consultation with other agencies

We consulted EQC, FENZ, ACC and the Ministry of Justice when preparing this advice.

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