

The Treasury

Treasury Advice Related to Modernising the EQC Act Information Release

December 2021

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- [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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Date: 25 August 2021

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

Copy: Minister of Finance (Hon Grant Robertson)

Deadline: 4.30pm Thursday, 26 August 2021

Modernising the EQC Act: Update

The purpose of this aide memoire is to brief you on the approach that Parliamentary Counsel Office (PCO) have taken to implementing the changes to the Earthquake Commission (EQC) Act that result from various recent Cabinet policy decisions. A significant choice for the drafters being whether to implement these changes by way of an amending Act, or a new Act.

This note discusses the basis for the decision to write a new Act, how any risks will be managed and also suggests some potential next steps if you have remaining concerns. We would like to discuss this with you at a meeting scheduled for 4.30pm on Thursday 26 August 2021.

Enacting policy changes

The key purpose of the EQC Bill (whatever its form) is to implement policy changes agreed by Cabinet (DEV-21-MIN-0062, CAB-21-MIN-0177 and DEV-21-MIN-0150 refer). These policy changes, summarised in Annex A, require extensive amendments to existing provisions of the EQC Act, and the development of entirely new provisions.

Parliamentary Counsel Office (PCO) consider that the proposed policy changes are sufficiently extensive to warrant a re-write of the current EQC Act. Treasury share this view.

PCO has guidance to help inform decisions on whether to amend or replace a piece of legislation. Drawing on that, factors in favour of replacement of the current EQC Act are:

- the amendments are very extensive, to the point where a full replacement would not take much longer to draft than a set of amendments;
- the amendment legislation would be hard for readers to follow, due to the nature and extent of the amendments; and

- the current EQC Act is dated and poorly structured, making it difficult to read.

Some opposing factors considered included:

- readers of the Bill may be confused over which provisions are new and which are simply carried over. The Bill's explanatory material (including the general policy statement, clause-by-clause analysis, etc) can mitigate this by being clear about what is and is not being changed.
- any controversial provisions being carried over from existing legislation can become matters for debate, even if they are not being changed. We have not identified any provisions in the existing EQC Act that are likely to prove controversial.

Your office has raised concerns that a rewrite of the EQC Act increases the risk of inadvertent policy or interpretive change (by changing provisions that would otherwise not be changed). We agree that this is a risk that needs to be managed. That said, PCO advise us that there would be very few provisions of the current Act that would not require amendment, and those that do not require change are mostly the more formal provisions with little policy content. As a general observation, the provisions with the greatest risk of the drafting not matching policy intent will be provisions that implement the policy decisions agreed by Cabinet. Therefore this risk exists for both an amended and new Act.

However, through events over the last decade, provisions in the EQC Act have been tested in court. There is a potential risk of legal challenge on any new provisions in the Act, even if these are intended only as wording changes rather than a deliberate policy change.

The current process includes measures to manage the risk of legal challenge or inadvertent policy change. These measures include the drafting instructions clearly indicating where no policy change is intended, and iterative circulation of drafts and feedback between PCO, Treasury and EQC. We are also paying close attention to the relevant case law and EQC operational practice. The Parliamentary process also provides opportunities for the Government to provide policy guidance, through the Bill's explanatory material (noted earlier), Ministerial speeches, and departmental reporting to select committee. Further scrutiny of the policy and the interpretative impact of the drafting will also be provided by the select committee examination and submission process, which can be expected to include technical submissions from insurers, lawyers and their representative organisations.

Further process assurance could be provided by providing an advanced exposure draft of the EQC Bill to groups with the necessary skills to provide technical feedback, for instance insurers, the Law Society and the New Zealand Insurance Law Association. Ideally groups consulted on an exposure draft would also include qualified stakeholders with a strong focus in the interests of claimants/ consumers, as well as insurers. While these same groups are likely to submit on the Bill, their feedback prior to introduction can improve the quality of the Bill at introduction, enabling the Select Committee to focus more on policy matters, rather than technical corrections.

The then-Minister Responsible for the Earthquake Commission in June 2020 decided against an exposure draft due to concerns about its impact on the timing of the then-aim of introducing an EQC Bill in mid-2021 (T2020/1766 refers).

If an exposure draft was now proceeded with, we estimate that it would extend the drafting time of the Bill by about 2 months; potentially longer if over the Christmas/ New year period, or less if feedback is limited or minor. As draft bills are subject to legal professional privilege, the sharing of exposure drafts outside the Crown may require the agreement of the Attorney-General. We can seek this approval if required.

Also, if an exposure draft is proceeded with, it would assist submitters if policy announcements and the accompanying proactive release of policy and Cabinet papers had already occurred, so submitters can understand the policy behind the text of the draft Bill.

Operational Implications

Implementing the agreed policy changes will have an operational impact on EQC. This includes time for EQC to update its own operational policies, systems and processes, and working with its insurance partners under the Insurer Response Model to ensure that they are also prepared to implement the changes.

There will be impacts for insurers beyond their role as agents for EQC. They will need to assess the impacts of any changes to the EQC Act on the private policies they offer (for example, there will be consequential amendments to their policies where their policies use terms or definitions that are also in the EQC Act). Insurers' long-standing position for a lead time of at least 18 months between the details of the new Act being finalised, and implementation, reflects their expectation that the new or amended EQC Act will require substantial review and updating of operational systems (including contracts, IT systems, and customer-facing services and products).

It is difficult to be clear how significant these operational implications will be at this stage. This is particularly the case for private insurers – insurers' views on implementation have so far, by necessity, been of a general nature. Insurers will be able to offer more informed views once they have the opportunity to engage with a complete Bill.

That said, in general, the more changes that are made to the EQC Act, the more significant the operational implications and the more lead-in time that may be required for EQC and for private insurers. All parties will need to maintain the capability (ie processes, procedures and training) to manage claims under the current Act (ie for claims yet to be settled or that will be reopened) as well as new claims under new Act. This will be a long-term need, as claims can take a long time to settle, and can be reopened.

Steve Cantwell, Acting Manager, Earthquake Commission Policy Team,

[39]

Annex A: Summary of Policy Decisions Requiring Substantive Drafting

This annex lists the more substantive policy elements that Cabinet has agreed to include within an amended or new EQC Act, from a drafting perspective. It is not a complete list of all policy decisions as it does not include policy decisions that are straight-forward to draft (e.g. the increase in the EQC monetary cap of EQC building cover).

The purpose of the Act and EQC's objectives and functions

- Introducing a purpose statement for the EQC Act;
- Amending EQC's functions, and the introduction of headline and function-specific objectives for EQC (the entity);
- Introducing provisions articulating the Government's policy interest in EQC [building and] land cover;

EQC Insurance Cover

- Introducing clear EQC repair standards for EQC building and land cover;
- Clarifying what costs associated with claims handling and settlement are covered by EQC;
- Changing EQC cover for mixed-use buildings (mainly, to more consistently treat common areas);
- Clarifying a range of key concepts including appurtenant structures, temporary and transient accommodation, and the scope of each natural hazard covered by the EQC Act;
- Codifying existing EQC practice regarding the valuation of different areas of land on a damaged landholding;
- Replacing the indemnity (depreciated) value limit of EQC cover for retaining walls, bridges and culverts by a limit based on the lesser of the undepreciated value, or a fixed monetary cap on EQC retaining wall cover of \$50,000 per dwelling, and a fixed monetary cap on EQC cover for bridges and culverts of \$25,000 per dwelling (both amounts excluding GST);
- Reviewing and updating the EQC Act's current list of exclusions from EQC cover, and introducing a regulation-making power that provides for some flexibility in modifying the list of exclusions while keeping EQC cover consistent with the key policy principles in the EQC Act;
- Clarifying that the information requirements for reporting claims in the EQC Act apply on an ongoing basis;

EQC information gathering and sharing

- Introducing explicit obligations on third parties, including private insurers, to provide EQC, in a reasonable timeframe, the information that EQC reasonably requires for the purposes of the EQC Act in a form acceptable to EQC;
- Enabling EQC to disclose information held by EQC to another government agency provided the requesting/receiving agency has a proper interest in receiving the information;

How EQC handles claims

- Requiring EQC to participate in a claimant dispute resolution scheme that is user focused and accessible, independent and fair, efficient, effective, accountable, and cost-effective, [to support a claimant-centred approach to claims handling and settlement];
- Providing for the assignment of the benefits of an EQC claim to a subsequent purchaser of a home,
- Clarifying the matters EQC must take into account in order to exercise its rights to salvage property;
- Enabling EQC to decline claims where there is no financial loss;

Updating offences and penalties

- Introducing a new offence for deliberate breaches of the obligation on insurance companies to pay EQC premiums collected on its behalf within a specified period,

EQC financial governance, roles, and sustainability

- [Introducing a legislative requirement for EQC to review its key financial settings, including the insurance premium and EQC insurance cap, at least every 5 years];
- Introducing a legislative requirement that the Government publish and table in Parliament a funding and risk management statement for EQC, that discloses
- changes to key financial settings, financial forecasts, the policy considerations that have been taken into account in setting EQC premiums and the government's funding strategy for addressing any projected funding shortfall;
- Introducing a legislative basis for setting EQC insurance premiums, and new decision-making considerations that the Minister Responsible for the EQC may 'have regard to',
- Introducing statutory separation between the NDF and EQC's operational assets;
- Ensuring that the EQC Act clearly reflects the Crown's current interest (or rights) as the ultimate owner of the NDF, to allow it to act in its own interest to influence the risks that it guarantees;
- Preserving the substance of the existing Crown funding guarantee for EQC liabilities, while providing more flexibility for any additional discretionary Crown funding, and limiting the basis for payments from the NDF to the Crown;
- Aligning EQC's capitalisation with standard ownership arrangements for Crown entities by capitalising EQC by way of contributed capital rather than share capital;
- Introducing a new "*benefit*" test for NDF funding of some of EQC's education and research functions;
- Providing for a suitable statutory mechanism, such as a services agreement, that allows the EQC to provide services to the government in exchange for public funding.