

# The Treasury

## Treasury Advice Related to Modernising the EQC Act Information Release

December 2021

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<https://www.treasury.govt.nz/publications/information-release/treasury-advice-related-modernising-egc-act-information-release>

Please refer to the final version of the Cabinet paper which has been included as its own document as part of this release.

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

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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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## Treasury Report: Modernising the Earthquake Commission Act: Second Cabinet paper

<b>Date:</b>	13 April 2021	<b>Report No:</b>	T2021/611
		<b>File Number:</b>	TY-2-1-11

### Action Sought

	Action Sought	Deadline
Minister of Finance (Hon Grant Robertson)	None.	N/A.
Minister Responsible for the Earthquake Commission (Hon Dr David Clark)	<p><b>Sign</b> the attached Cabinet paper.</p> <p><b>Consult</b> your colleagues on this paper.</p> <p><b>Lodge</b> the Cabinet paper, reflecting any feedback.</p>	Lodge by 10:00am 29 April for consideration by DEV on 5 May 2021.

### Contact for Telephone Discussion (if required)

Name	Position	Telephone	1st Contact
Steve Cantwell	Principal Advisor, Earthquake Commission Policy Team	[39]	[35] ✓
Helen McDonald	Manager, Earthquake Commission Policy Team		

### Actions for the Minister's Office Staff (if required)

<p><b>Return</b> the signed report to Treasury.</p> <p><b>Lodge</b> the attached Cabinet paper by 10:00am 29 April 2021.</p>
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Note any feedback on the quality of the report

**Enclosure:** Yes (attached)

## Treasury Report: Modernising the Earthquake Commission Act: Second Cabinet paper

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### Purpose of Report

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1. Attached for your feedback and signature is a draft of the second of three Cabinet papers seeking Cabinet decisions on the content of the planned 2021 Earthquake Commission (EQC) Bill.
2. The paper reflects your decisions on the following Treasury reports:
  - *Modernising the Earthquake Commission Act: Monetary caps on retaining walls, bridges and culverts* (T2021/332)
  - *Modernising the Earthquake Commission Act: Technical Issues* (T2020/3814)
  - *Modernising the Earthquake Commission Act: Claims Excesses on EQC Land Cover* (T2021/758)
  - *Modernising the Earthquake Commission Act: Claims Handling and Settlement - Additional Issues* (T2021/351), and
  - *Modernising the Earthquake Commission Act: Aligning with the Crown Entity Framework* (T2020/3719).
3. This paper was originally intended to also address proposals for an increase in the \$150,000 (plus GST) monetary cap on EQC building cover (the cap). Following consultations with your office, that issue will now be addressed in a later, separate Cabinet paper.
4. This paper is provided to you before the first Cabinet paper (DEV-21-SUB-0062 refers) is considered by Cabinet Economic Development Committee (DEV) on 14 April 2021. It is drafted on the basis that the recommendations in that paper will be agreed by Cabinet on 19 April. It also therefore currently refers to the DEV submission, not the resulting minute. This reference will be updated to reflect the appropriate minute prior to lodgement on 29 April.
5. The draft Cabinet paper also seeks Cabinet authorisation for you to make decisions, in consultation with relevant portfolio Ministers as necessary, on any additional policy, implementation and commencement, drafting or minor technical issues that arise during the development of the EQC Bill and associated regulations for Cabinet Legislation Committee.  
[33]
6. Also attached is a draft Regulatory Impact Statement (RIS) prepared by Treasury, dealing with all issues addressed in this paper that require an accompanying RIS. The RIS will be finalised for lodgement with the Cabinet paper on 29 April. One purpose of a RIS is to record officials' advice where proposals being put to Cabinet differ from that advice. The only issue in the RIS where that is the case is the proposed ten-year time bar on reopening EQC claims (which EQC recommended and Treasury did not).

## Issues arising during drafting of the Cabinet paper

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### *Time bar on reopening EQC claims*

7. The draft Cabinet paper reflects your decision to introduce a ten-year time bar on reopening EQC claims, starting from the date of the first settlement (T2021/351 refers).
8. The Treasury and EQC discussed the proposed time bar with the Legislation Design Advisory Committee (LDAC) on 8 April 2021. LDAC raised orally a number of concerns in relation to the proposed time bar that will likely be raised during the Select Committee process. We expect LDAC to also convey these concerns in writing in the next few days. We will provide a copy of the LDAC comments to your office when received.
9. LDAC concerns, described more fully in the next section, included:
  - the purpose of the proposed time bar
  - application of the time bar in circumstances where institutional failures have led to the reopened claims
  - the starting point and length of the time bar
  - the interaction between the proposed time bar and other limitation regimes; and
  - Increased litigation risk and implications for claimants.
10. In light of those concerns, we seek confirmation of whether you wish the Cabinet paper to seek Cabinet agreement to the time bar proposal (the current drafting), or whether you wish to seek a more qualified Cabinet agreement. That could be, for instance, to seek Cabinet agreement in principle to the proposed time bar, subject to that decision being confirmed by a small group of delegated Ministers (we suggest yourself, the Minister of Finance, and Associate Minister of Finance responsible for the Greater Christchurch Claims Resolution Service (GCCRS) Hon Dr Woods).
11. This approach would enable Cabinet to agree to the policy direction, while creating space for further advice to delegated Ministers on the implications of, and mitigation options for, the LDAC concerns, so that the final policy and design decisions regarding this proposal can give due consideration to the LDAC concerns.
12. A key judgement for you in considering this option is whether you see the indicative LDAC concerns as being able to be considered, and where appropriate, managed during the drafting process (EQC's view), or whether you see attempting to address the concerns as likely to raise substantive policy questions requiring Cabinet (via delegated Ministers) input (Treasury's view).
13. EQC considers that it is highly likely the package of proposals underpinning the EQC Act modernisation, including the points raised by LDAC, may need further decisions from Ministers (or Cabinet) as the legislation progresses. In this context, EQC does not recommend altering the time bar-related recommendations at this point in time. Treasury sees the "in principle" approach as reducing the risk that a further Cabinet paper will be required. The attached Cabinet paper aims to avoid new issues emerging that need further Cabinet decisions, by seeking authorisation for you to make decisions, consistent with prior Cabinet decisions, on any emerging matters. In Treasury's view, addressing the LDAC concerns might result in decisions inconsistent with the Cabinet decisions sought in this paper.

14. If you choose the “agreement in principle” approach we would aim to provide advice to delegated Ministers by June 2021.

*LDAC Concerns with the proposed time bar*

*The purpose of the time bar*

15. LDAC noted that the purpose of the proposed time bar needed to be clear as it will limit the ability of claimants to seek redress. LDAC queried the relationship between on one hand, the EQC scheme objective of ensuring the overall quality of housing stock following a natural disaster, and on the other, the objectives of the proposed time bar.

*Application where the claim relates to institutional failures*

16. LDAC expressed concern that the proposed time bar would apply to reopened claims resulting from institutional failures at EQC. LDAC’s view was that if the issues leading to the reopened claim result from a failure of institutional performance, it was difficult to understand why a claimant should be time barred from reopening a claim.

*Starting point and length of a time bar*

17. With regard to the starting point for the time bar, LDAC noted the complexities associated with choosing the most appropriate starting point. LDAC considered the starting point needs to take into account different types of events, the range of reasons why claimants reopen claims, and that it needs to be fair to all claimants. For example, LDAC suggested (drawing on features of the Limitation Act 2010) it should start from a point when the damage was reasonably discoverable.
18. It was also noted that any time period was somewhat arbitrary and would need to balance many competing factors, including that shortages of engineers and tradespeople following a large disaster may delay the identification of damage.

*Increased litigation risk and implications for claimants*

19. LDAC noted that there is the potential for increased litigation as claimants wanting to review a claim will instead lodge legal proceedings. This will increase costs for both EQC and claimants.

*Interaction with other limitation regimes*

20. LDAC queried how the proposed time bar would interact with other limitation regimes. Questions included:
  - When does the time bar apply relative to when the Limitation Act applies?
  - How would the ‘late knowledge’ rules in the Limitation Act affect the time bar?

***We propose minor amendments to your decisions on EQC Act exclusions (Schedule 2)***

21. The current EQC Act includes a list of exclusions at Schedule 2 titled ‘property not insured by this Act’. Updating the exclusions will provide clarity regarding what is covered by EQC. In decisions on our report *Modernising the Earthquake Commission Act: Technical issues* (T2020/3814 refers) you agreed to:

- update the list of exclusions, including to further clarify that the EQC Act no longer covers contents, and other minor clarifications
  - create a new regulation making power to enable regulations to be made listing exclusions from the scope of EQC cover, and
  - shift the list of exclusions from EQC cover currently located in Schedule 2 to regulations made under the new regulation making powers, to provide for future flexibility.
22. Our previous advice noted we would work with the Parliamentary Counsel Office (PCO) on any remaining technical matters relating to the exclusions that arise through the drafting process.
23. We have since consulted LDAC on these proposals. LDAC raised concerns around the proposal to shift the list of exclusions at Schedule 2 to sit in regulations. This is because LDAC considers excluding property from coverage of the Act goes to the heart of the legislation and should therefore be in primary legislation. Consequently, we recommend that you rescind agreement to the proposal to shift the Schedule to regulations.
24. Additionally, we have undertaken further work on appropriate constraints around the new regulation-making power to amend the list of exclusions. The current EQC Act already provides the ability to make new exclusions via regulation,<sup>1</sup> but not to edit or remove exclusions already in Schedule 2.
25. Feedback from LDAC noted that views on good legislative practice have shifted since the EQC Act's inception, regarding the appropriate safeguards that should accompany regulation-making powers. LDAC advice was to either remove the current power to amend the exclusions in the Act, or constrain it appropriately. Our preference is to retain an empowering provision in the Act that allows for some flexibility around the exclusions list, but constrain it, only to be used in specific circumstances such as:
- to clarify the scope of EQC cover, or
  - to update the characterisation of property listed in Schedule 2 in light of technological, regulatory, or other developments.
26. While this is a narrowing of the current power at 36(1)(a), it is consistent with modern drafting practice, to reduce the potential for regulations to be made that were beyond that intended by Parliament. For example, regulations causing significant change to the scope of the EQC scheme's cover and the entitlements of insured homeowners under the Act.
27. If you agree, we will work with PCO on the approach to including an empowering regulation-making provision that provides for some flexibility in the list of exclusions in the Act, while retaining the key policy principles in the Act itself.
28. The attached Cabinet paper reflects our new advice regarding exclusions. We will update the draft Cabinet paper as necessary to align with any further feedback from you on this matter.

***Future consideration of the distributional consequences of the EQC scheme***

29. When we met on 25 March 2021 you asked that this Cabinet paper note that the first five-yearly review of key EQC monetary values, including premium rates, would consider the regressivity or distributional consequences of the scheme. As decisions on the five yearly review were sought in the first Cabinet paper, there is no natural place to address this issue in this Cabinet paper.

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<sup>1</sup> Section 36(1)(a).

30. However, proposals in the first Cabinet paper include an authorisation that would enable you to address this issue during the drafting process:
- “21 **agree** that the EQC Act should specify that the basis for EQC insurance premiums is to cover the cost of EQC insurance cover and any associated operating costs (including any contributions or historic advances made by the Crown) that relate to the discharge of EQC’s insurance functions;
- 22 **agree**, to give effect to recommendation 21, that the EQC Act should include a set of decision-making considerations that the Minister Responsible for the EQC may “have regard to” and that these should include:
- 22.1 the financial position of the Government (as guarantor);
- 22.2 the impact that EQC premiums will have on the uptake of private insurance cover;
- 22.3 the benefits for the public of predictable premiums (i.e. the need to avoid large annual changes);
- 23 **authorise** the Minister Responsible for the EQC to make relevant additions to decision-making considerations for inclusion in the EQC Act;”
31. Therefore, we suggest picking this issue up in drafting the Bill, perhaps by including a reference that the review consider the distributional effects of the EQC scheme.
32. In principle, the review of EQC premiums that would accompany any upcoming increase in the cap would be an opportunity to consider regressivity arising from the current flat-rate EQC premium. However, this work, if undertaken, would need to start well before implementation, as:
- policy, operational, modelling and actuarial work by Treasury and EQC would be from a standing start as we have not seriously examined this question before, and
  - we anticipate that moving away from flat-rate EQC premiums would be likely to have major systems implications for insurers, requiring more extended lead times than the 18 months’ minimum lead time that insurers have signalled for a simple increase in the cap.

## Communications

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33. Both the first Cabinet paper seeking decisions on a modernised EQC Act, and this one, contain the following standard recommendations regarding communications:
- “**note** the Minister Responsible for the EQC will announce the intention to introduce an Earthquake Commission Amendment Bill, subject to Cabinet agreement to the proposals set out in this paper;
- note** that this Cabinet paper will be proactively released as soon as possible following Cabinet decisions, subject to any redactions consistent with the Official Information Act 1982.”
34. Key communication strategy questions include:

- whether to release all the Cabinet papers regarding modernising the EQC Act individually, or together as a reform package
- whether key stakeholders receive any embargoed briefings
- if released as a package:
  - whether to make a media release at the same time
  - whether to release the Cabinet papers as soon as possible, or closer to, or with, introduction of the EQC Bill.

35. You may want to consider these questions, or discuss them with officials, and reflect any decisions in the lodged Cabinet paper.

## **Recommended Action**

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We recommend that you:

a **sign** the attached Cabinet paper

*Agree/disagree.*

b **agree** that your Office begins consultation with your colleagues based on this paper

*Agree/disagree.*

c **note** the attached draft Regulatory Impact Statement

d **agree** that the attached Cabinet paper, subject to any modification arising from consultation with your colleagues, be lodged by 10:00am 29 April for consideration by DEV on 5 May 2021

*Agree/disagree.*

### *Time bar on reopening EQC claims*

e **note** you agreed to introduce a time bar on reopening EQC claims, of 10 years from the date that an EQC claim is first settled (T2021/351 refers)

f **note** that we have recently consulted the Legislation Design and Advisory Committee (LDAC) on this proposal, who raised several concerns regarding the proposal for a time bar.

Either

g **agree** that the Cabinet paper seek Cabinet agreement to the time bar proposal (i.e. the current draft) **(EQC preferred option)**

*Agree/disagree*

Or

h **direct** officials to redraft the time bar proposal to seek Cabinet agreement in principle to the time bar, subject to that decision being confirmed by a small group of delegated Ministers **(Treasury preferred option)**

*Agree/disagree*

### *Amendments to your decisions on EQC Act exclusions (Schedule 2)*

- i **note** in response to our report *Modernising the Earthquake Commission Act: Technical issues* (T2020/3814 refers) you agreed to:
- a. update the list of exclusions, including to further clarify that the EQC Act no longer covers contents, and other minor clarifications
  - b. create a new regulation making power to enable regulations to be made listing exclusions from the scope of EQC cover, and
  - c. shift the list of exclusions from EQC cover currently located in Schedule 2 to regulations made under the new regulation making powers, to provide for future flexibility.
- j **note** we have since consulted LDAC on these proposals who raised concerns around the proposal to shift the list of exclusions at Schedule 2 to sit in regulations.
- k **agree** to rescind agreement to the proposal to shift the Schedule to regulations.

*Agree/disagree.*

- l **agree** to retain an empowering provision in the Act that allows for some flexibility around the exclusions list, but constrain it, only to be used in specific circumstances such as:
- to clarify the scope of EQC cover, or
  - to update the characterisation of property listed in Schedule 2 in light of technological, regulatory, or other developments

*Agree/disagree.*

- m **note** we will work with PCO on the approach to including an empowering regulation-making provision that provides for some flexibility in the list of exclusions in the Act, while retaining the key policy principles in the Act itself

### *Future consideration of the distributional consequences of the EQC scheme*

- n **note** that on 25 March 2021 you asked that this Cabinet paper note that the first five-yearly review of key EQC monetary values would consider the regressivity or distributional consequences of the scheme
- o **note** that proposals in the first Cabinet paper on modernising the EQC Act include an authorisation that, if agreed, would enable you add to the factors that a future Minister have regard to in setting EQC premiums

### *Communications*

- p **note** that you have a range of choices regarding the timing and format of public communication of the policy decisions sought in the attached Cabinet paper and its two accompanying papers
- q **indicate** if you wish to make any changes to the Communications section or recommendations of the attached draft Cabinet paper

*Yes/No.*

r **indicate** if you wish to discuss communication options with officials.

*Yes/No.*

Helen McDonald  
**Manager, Earthquake Commission Policy Team**

Hon Dr David Clark  
**Minister Responsible for the Earthquake Commission**