

FENZ Bill – Select Committee Report

Summary of key issues

The following is a summary of the key issues relevant to the insurance industry, in particular

- The levy regime for funding FENZ
- Levy disputes, avoidance and exemptions

The Select Committee's amended Bill will be returned to Parliament for the second reading when the House next sits in February. The legislation will need to be passed in the first quarter of 2017 to enable the creation of Fire and Emergency New Zealand (FENZ) from the merger of the current rural and urban fire services.

The levy regime for funding FENZ

Broadening the levy base

The term "physical damage or loss" is to be replaced with "physical loss or damage"; this will change the definition of a "contract of insurance". This amendment clarifies that policies insuring against economic losses will not be levied.

Applying levies to collections will create issues for public museums and galleries; it is recommended this be addressed in regulations under the legislation.

Definitions of "amount insured"

The legislation uses the terms "amount insured" and express maximum limit" which are not standard terminology in the insurance industry. A number of submitters suggested the term "sum insured" would be preferable. The Committee however consider the terms should be retained.

Contesting a determination of declared value

Under the original Bill the declared value could be contested by FENZ. They could obtain a valuation which would then become the declared value. This option is still open to FENZ however now the Insured can subsequently obtain their own valuation which would supersede the FENZ valuation.

Circumstances where policyholder or broker must pay levy

Amendments clarify that in instances where cover for risk is provided by an overseas entity, the policyholder is liable to pay the levy. Additionally in these circumstances brokers are included as levy payers. Also a new clause would provide that a broker that negotiates a contract of insurance between a policyholder and an overseas entity would be liable to pay the levy to FENZ.

Levy exemptions

An exemption has been included in legislation for aircraft that fly scheduled international services.

Exemption making powers have been widened removing the requirement that there is “no potential for FENZ’s services to be required” and replacing it with a requirement that, in recommending an exemption, the Minister must have regard to the purposes of the levy regime, and to the potential impact on the cost efficiency and effectiveness of administering the levy.

Also recommended is an amendment that would provide that regulations may establish exemptions from the levy for certain types of property, contracts or classes of insurance, and policyholders or classes of policyholder.

Anti-avoidance

Subpart 4 has been amended to clarify the intent and operation of this part of the bill, as well as to respond to some concerns raised by submitters. In particular the following areas:

Definitions of levy avoidance and levy advantage

Amendment to the definition of “levy avoidance arrangement” in clause 70, to clarify that merely reducing one’s sum insured, or under-insuring, would not amount to avoidance. It is acknowledged some businesses may make legitimate business decisions to reduce their insurance cover, and the amendment to the definition should clarify that having reduced cover is not, in itself, levy avoidance.

Shortfall penalties

New clauses, 92 to 96, have been added for clarity. These cover definitions, interpretation, and other matters related to shortfall penalties. Different kinds of situations where a person avoids the levy are also set out.

Under clause 97 an amendments provide for reductions for levy shortfall penalties, in alignment with those available under the Tax Administration Act. Penalty reductions are allowed for where the levy payer has made adequate disclosure of the levy position at the time the levy payer takes the levy position. Also a reduction in penalty is allowed if a person makes full, voluntary disclosure prior to FENZ issuing a notice of levy shortfall.

Joint and several liability for penalties

New clause 97C provides that an insurer, policyholder, or insurance intermediary can be held jointly and severally liable for shortfall penalties and interest.

There is provision for defences against the application of shortfall penalties, where a party to an insurance contract can demonstrate that they were not involved in the taking of the levy position, that they reasonably relied on information from another person, or that the contravention was beyond their control and they took reasonable precautions and exercised due diligence to avoid it.

Power to require information (FENZ)

The Committee consider it important that FENZ is required to act reasonably in seeking information, and are aware that this is a common requirement for subjective tests. Accordingly, they recommend amending clause 86 to reflect that FENZ should be acting reasonably.

Levy disputes, avoidance, and exemptions

The Committee decided that the proposed dispute resolution scheme is insufficient for disputes relating to the levy. As a result, they propose a number of changes to the bill to set out the key elements of a separate levy disputes resolution scheme.

Notice of levy shortfall process and adjudication

The aim of a new subpart 4A is to establish a process that ensures fair and transparent dispute resolution, tailored to the fire service levy scheme. There are a number of new clauses:

- 98A** sets out that in an adjudication or process relating to levy shortfall or shortfall penalties, the burden of proof is on the respondent disputing FENZ's assessment of the liability.
- 98B** sets out that FENZ is not able to provide a notice of levy shortfall if four years have passed after the date on which a contract of insurance was entered.
- 98D** allows FENZ to provide a notice of levy shortfall to a levy payer and to a person responsible for a shortfall penalty. This would include FENZ's assessment of liability for levy shortfall and any shortfall penalty.
- 98E** sets out what is required for the content of a notice of levy shortfall. The notice must:
- identify the levy shortfall FENZ considers to be payable by the levy payer
 - identify any shortfall penalty that FENZ considers to be payable
 - identify each respondent whom FENZ considers is liable to pay the shortfall penalty
 - provide a statement of the key facts and details in enough detail to inform the respondent of the grounds for the liability
 - state how the law applies to the facts.
- 98F** specifies that any party identified as potentially liable must prepare a response to the notice of proposed adjustment to FENZ within 40 working days of the notice being provided. Also, the clause sets out what a notice of response must concisely state.
- 98G** provides that if a respondent does not provide a notice of response to FENZ within the required timeframe, the respondent is deemed to have accepted their liability as set out in the notice.
- 98H** allows FENZ to provide a new notice of levy shortfall if FENZ considers that an additional person is liable to pay a shortfall penalty, but to whom a notice was not provided.
- 98I-M** next steps of the process if parties do not agree. A key aspect of this is for FENZ and the respondent to prepare statements of position.
- 98N** provides that outstanding disputes (after 80 working days from the date that FENZ provided the statement of position) would be referred to adjudication by an independent authority, unless both parties agree to proceed to court.
- 98O-W** details of the adjudication process, adjudicator and publication of the outcome.