

## 15. Authorising the charging of fees and levies

The ability to recover some or all of the cost of providing or performing a public function will often be vital to the ability of an agency to provide or perform that function. Granting a public body the power to charge fees or levies is a common method of cost recovery.

Legislative authority for imposing fees or levies is usually granted by empowering provisions that authorise the executive to make regulations providing for fees or levies. This chapter will help ensure that those empowering provisions are included in appropriate circumstances, and that the authority to make regulations is exercised in an appropriate manner.

There is an important distinction between a fee or levy and a tax.

Parliament may delegate to the executive the power to set and charge a fee or levy, but a tax may only be imposed by or under an Act. In rare circumstances Parliament may delegate the setting of certain features of a tax to the executive, but only in very certain and confined terms. Failure to provide adequate authority for a tax in the primary legislation may result in the courts declaring the subsequent regulations invalid. This may result in disruption to the provision of the service or function and considerable financial consequences to the agency concerned.

There is a further distinction between a fee and a levy. A levy is more akin to a tax in that it is usually compulsory to pay it, and is usually charged to a specific group. Also, a levy charged to members of a certain group or industry is usually used for a particular purpose (such as market development), rather than relating to specific services provided to an individual. In the Regulation Review Committee's view, imposing a levy using a fee-setting power is contrary to Standing Order 319(2)(c) in that the regulation appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made.

Fee-setting and levy-setting regulations made under the empowering provision are delegated legislation. As such, the considerations in Chapter 13 will apply and the regulations will be reviewable by the Regulations Review Committee. A discretion to waive a fee is, in effect, an exemption power (see Chapter 14).

Two essential pieces of guidance to review at an early stage are the Treasury's *Guidelines for Setting Charges in the Public Sector* (December 2002)<sup>103</sup>, and the Office of the Auditor General's guidance *Charging fees for public sector goods and services*<sup>104</sup>.

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<sup>103</sup> <http://www.treasury.govt.nz/publications/guidance/planning/charges>

<sup>104</sup> <http://www.oag.govt.nz/2008/charging-fees>

## Guidelines

### 15.1. Should the service or function be subject to a fee?

*Fees should only be charged where the nature of the service or function is appropriate and the fee can be quantified and efficiently recovered.*

Whether or not a service or function should be subject to a fee is not always clear and will involve a number of considerations. The table below sets out some of the key issues to consider when determining if it is appropriate to charge a fee:

<b>Fees may be appropriate</b>	<b>Fees may be inappropriate</b>
Service or function is rendered to an individual and confers a benefit	Service or function is provided to the community as a whole
Service or function is rendered by request	Service or function is non-voluntary
Easily quantifiable	Impractical to quantify the fee
Easy to recover	Impractical to recover the fee
Service or function is transactional or regulatory in nature	Service or function is contractual in nature (and the level of charge can be negotiated contractually)
Examples: driver licensing and passports, and Overseas Investment Office consents	Examples: police, public hospitals, and Department of Conservation concessions

Legislation should not provide for regulations to prescribe a fee for a service if the service is something that the user is not bound to use or the provider is not bound to provide, and the level of the fee could be negotiated contractually when the service is requested (such as granting a licence to run a business in a national park).

Whether or not the courts find that a particular charge is a fee or a tax will involve considering:

- the terms of the empowering provision;
- the level of the charge;
- the costs of providing the service or performing the function, relative to the income from charges;
- the purpose for the charge;
- who the charge applies to;
- in what circumstances the charge is imposed.

A fee may be considered a tax if it does not bear a proper relation to the cost of providing the function or service to which it relates.

### **15.2. Should the objective or function be subject to a levy?**

*Levies should only be imposed where it is appropriate for a certain group to contribute money for a particular purpose.*

A levy does not relate to a specific good or service. It is usually charged to a particular group to help fund a particular government objective or function. ACC levies, for example, are factored into the costs of petrol and vehicle licensing to help cover the cost involved in treating people who are injured in motor vehicle accidents. The person paying might never benefit personally from the government service, but it is desirable that they contribute to the cost.

Another example is where the members of a particular industry pay a levy to cover the costs of a regulator or promoter of that industry. A particular member may have little direct contact with the regulator or not directly benefit from the promotion, but it is appropriate that the member contributes towards the costs. Where the Commodity Levies Act 1990<sup>105</sup> can apply, it is usually not acceptable to enact (by Act) a parallel scheme for a particular industry.

The key distinction between a levy and a general tax (such as income tax or GST) is that revenue gathered by a tax is not usually earmarked for any particular purpose. Rather, it is appropriated and spent by the Government according to the particular policy objectives or requirements of the day.

In some cases it will be appropriate to use a levy to pay for the costs of a particular government objective or function. In other cases it will be appropriate to use a tax-funded appropriation; for example, if the benefits accrue primarily to the public as a whole and there is only a remote connection to the group that would pay the levy.

### **15.3. Does the legislation provide authority to prescribe a fee or a levy?**

*Legislation must include an empowering provision that specifically authorises the executive to prescribe a fee or a levy.*

With the exception of payments received under contractual agreements (public bodies generally do not need statutory authority to enter into contracts for commercial transactions), it will usually be unlawful for a public body to charge a fee or levy without express authority from Parliament.

### **15.4. How is the fee amount determined?**

*Legislation must set out the manner by which to determine the fee.*

The empowering provision should state the basis by which to prescribe the fee. Fees for a service or function should normally be determinable in advance by the payer before the service or function is performed, unless the Act contemplates otherwise. Often fees and levies will be a fixed amount. However, if a fee is to be determined by a particular method or

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<sup>105</sup> <http://www.legislation.govt.nz/act/public/1990/0127/latest/DLM226674.html>

calculation (such as a fee calculated by reference to an hourly rate), this should be authorised in the empowering provision.

The fee amount recovered should bear a proper relation to the cost of providing the service or function and should not exceed the cost of providing the service or function. Where the fee amount exceeds the cost, the fee will be at risk of being declared unlawful on the basis it is an unauthorised tax.

Any authority given to charge a fee is therefore implicitly capped at the level of cost recovery. Specific authority in the Act would be required to charge a fee that would recover more than the cost of providing the service because of an intention to impose a penalty, limit access to, or demand for, a service; or to meet a social objective. It is good practice that the relevant Cabinet papers provide a clear justification for the level of the fee.

A fee that cross-subsidises other services or other groups of users should generally be avoided. However, in the rare cases where it may be appropriate for a fee to cross-subsidise other services, or other users, the cross-subsidisation should be transparent and the empowering provision must be drafted widely enough to authorise the cross-subsidisation.

#### **15.5. How is the levy amount determined?**

*Legislation must set out the manner by which to determine the levy.*

There must be a proper relation between the levy amount charged and the particular objective or function concerned. The amount of a levy imposed on a particular group should be commensurate with the degree of connection between the group and the objective or function concerned. For example, if a levy covers the costs of a regulator, it may be inappropriate to impose a large levy on a group that has little to do with the functions of the regulator.

In some cases, an objective or a function is funded from a mixture of levies and an appropriation (for example, levies may pay for a portion of the costs of a regulator while an appropriation may pay the balance). In this case the benefits that accrue to the regulated industry should be considered, as should the broader public benefit.

#### **15.6. Who will pay the fee or levy and in what circumstances can it be waived or refunded?**

*Legislation must clearly identify who may be charged the fee or levy and in what circumstances it may be waived or refunded.*

Fees should only be charged to those people who benefit from the service or function. The fee should not be used to offset the cost of future users of the service, nor to attempt to recover any deficit that may have occurred as a result of previous under-recovery. A fee that does so will risk being declared unlawful.

Levies may be charged to a class or group of people (often defined by the fact that they are undertaking a certain activity), to fund certain costs that may arise in connection with that activity. It is not necessary that the person paying obtains a direct benefit from paying the levy.

Payment of a fee or levy cannot be waived or refunded without authorisation from an Act. The Act may either explicitly authorise the refund or waiver, or it may empower the making of regulations to authorise a refund or waiver. In either event, the Act or regulations should identify the circumstances under which the fee or levy may be waived or refunded.

**15.7. Should there be a special process in connection with prescribing the fee or levy?**

*Legislation should identify any procedural requirements that must be carried out in connection with the fee or levy.*

In some cases it will be appropriate for the Act to set out specific procedural requirements that must be satisfied before prescribing a fee or levy.

It may be desirable for the Minister responsible for the empowering Act to consult with existing and potential users of the service, industry groups, or the public more generally before recommending regulations to prescribe a new fee or levy.

In some cases it may be appropriate for a significant levy to be subject to a confirmation process (where regulations lapse at an identified time unless confirmed earlier by an Act).