

Office of the Minister for the Environment

Chair

Cabinet

Approval of policy decisions in relation to cost recovery of Boards of Inquiry and approval to introduce an EEZ Act Amendment Bill to the House

Proposal

1. I am seeking approval from Cabinet to amend the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act) to include provisions enabling the Minister for the Environment to recover costs associated with Boards of Inquiry (BOIs) appointed under the EEZ Act.

Executive Summary

2. The EEZ Act does not provide for costs incurred by a BOI appointed by the Minister for the Environment to determine publicly notified marine consent applications to be recovered from the applicant.
3. This oversight in the legislation occurred when the EEZ Act was amended in 2017 to align decision making processes under the EEZ Act with the Resource Management Act 1991 (RMA).
4. If the EEZ Act is not amended to provide cost recovery powers to the Minister for the Environment, up to 75 percent of the total cost of a BOI process will fall to the Ministry for the Environment (MfE) to fund.
5. This paper seeks approval from Cabinet to introduce the attached EEZ Act Amendment Bill 2018 into the House as soon as possible following this Cabinet meeting.

Background

6. When enacted in 2013, the EEZ Act provided that all publicly notified marine consent applications were processed and determined by a decision-making committee (DMC) appointed by the Environmental Protection Authority (EPA). The EPA recovered from the applicant the actual and reasonable costs of receiving, processing and deciding the marine consent.
7. In June 2017, the EEZ Act was amended as part of the Resource Legislation Amendment Act 2017 (RLAA). This included the introduction of a BOI process to decide publicly notifiable marine consent applications for activities restricted by section 20 of the EEZ Act. Section 20 activities include the construction, placement, alteration, extension, removal or demolition of a structure or submarine pipeline on or under the seabed, the removal of material from the seabed and the destruction or disturbance of the seabed. In the EEZ, these activities generally relate to petroleum development and seabed mining. The purpose of the amendment was to align decision-making processes under the EEZ Act with nationally significant proposals under the RMA.

8. Under the RMA, I can recover the costs of a BOI from an applicant and can delegate the cost recovery function to the EPA. However, when the EEZ Act was amended to align its processes with the RMA, it did not include the equivalent cost-recovery provisions.
9. The costs incurred by a BOI appointed under the EEZ Act are currently unrecoverable. This includes members' fees and travel (direct costs) and costs that the EPA incurs on behalf of the BOI such as external legal advice (indirect costs). The costs that can be recovered are the costs incurred by the EPA to process the application and administer the BOI process.
10. The EPA has already received an application from Tamarind Resources for a publicly notifiable marine consent application, for which I must appoint a BOI. The members of the BOI are likely to be appointed in May 2018.

Comment

11. The EEZ Act adopts a user pays system for marine consent applications. Applications are considered to be matters of private rather than public benefit and are therefore subject to full cost recovery.
12. The lack of an ability for the Minister to recover costs in the same manner as the EPA was an oversight in the legislation when the BOI process was introduced to the EEZ Act through the RLAA in 2017.
13. The actual cost of a BOI for a marine consent is not yet known, as no applications have as yet been decided by this process. However, for a nationally significant proposal considered by a BOI under the RMA, the average cost recovered from an applicant is \$1.66 million.
14. Previous publicly notified oil and gas marine consent applications under the EEZ Act decided by a decision-making committee (DMC) appointed by the EPA cost applicants between \$450,000 and \$940,000. The three seabed mining applications that have been considered under the EEZ Act have averaged around \$2 million.
15. It is difficult to apportion the EPA's costs in administering the BOI process, from the indirect costs the EPA incurs on behalf of the BOI. However, based on previous marine consent applications and nationally significant proposals, the Ministry for the Environment (MfE) and EPA have estimated the proportion of the total cost of a marine consent application under a BOI process as follows.

	BOI direct costs	BOI indirect costs	EPA costs
Examples of type of cost	Remuneration and travel	External legal and technical advice Hearing costs	Initial completeness assessment and notification
Proportion of total cost	23 percent	52 percent	25 percent

16. The BOI costs associated with any marine consent application already lodged will fall to MfE to fund. I am not proposing to introduce an amendment that will recover costs from applications already lodged as this would be unfair to applicants that have already entered the process under the existing provisions.

17. Based on estimates provided by the EPA, the cost to MfE for the Tamarind Resources application that has been lodged will be up to \$660,000. If the EEZ Act is not amended, BOI costs associated with future marine consent applications will also fall to the Crown.
18. Not providing for cost recovery in relation to BOIs will result in a discrepancy between decision making pathways. Under existing arrangements, applicants for non-notified consents determined by the EPA (or a DMC appointed by the EPA) will pay the full costs of processing and determining the application, while applicants for notified consents determined by a BOI, will only pay the EPA costs in administering the BOI process. It will also result in a discrepancy between how costs can be recovered under a BOI convened under the RMA and a BOI convened under the EEZ Act.
19. I intend to align the cost recovery power provided to the Minister in the EEZ Act for publicly notified section 20 activities and nationally significant cross-boundary activities, with the existing cost recovery power of the Minister in respect of a BOI convened under Part 6AA of the RMA. That power is for cost recovery on the basis of the actual and reasonable costs incurred by the BOI. I also intend that the cost recovery principles, given regard to by the Minister when recovering BOI costs, align with those set out in section 149ZD(6)(a) and (c) of the RMA.
20. Further, I propose that the Minister's cost-recovery power can be delegated to the EPA, and that any charges payable by an applicant, for the costs of a BOI that are not paid, constitute a debt to the Crown and are recoverable by the EPA in any court of competent jurisdiction.
21. I am also proposing that the Minister must, upon request by an applicant, provide an estimate of the costs likely to be recovered and that the Minister may delegate this function to the EPA.
22. I do not intend to apply the proposed amendments retrospectively to any marine consent applications already lodged with the EPA. Therefore, I propose that transitional provisions are included in the Bill to ensure that costs associated with the BOI for applications already lodged with the EPA and determined to be complete are not subject to the new cost recovery provisions.
23. The draft environment legislation bids prepared for the 2018 legislative programme included a bid for an EEZ Act Amendment Bill to make these changes. It was recommended that the Bill be given Category 2 priority (must be passed within the year).
24. I consider that this amendment should be progressed as soon as possible (and on a faster track than that indicated in the legislation bid) in order to ensure continuity of the cost-recovery model and to ensure that the amendments are in force before any other marine consent applications (in addition to the one already lodged) are submitted resulting in costs falling to the Crown.
25. Given the urgency of the matter, I have added the attached EEZ Act Amendment Bill to the list of urgent bills to be progressed through the House; and have brought both this proposal and the Bill directly to Cabinet with the intention of introducing the Bill to the House as soon as practicable after Cabinet approval.
26. I intend that the Bill goes through a short select committee process in the House (1-2 weeks) following its introduction.

Consultation

27. I have undertaken targeted consultation with those stakeholders who may, in the future, require marine consents for publicly notifiable activities that are now subject to a BOI process. This included seven representatives from the oil and gas and seabed mining industries. There was broad support for the proposals in this paper.

28. The following departments and Crown entities have been consulted on the development of this paper: the Ministry of Business, Innovation and Employment, Department of Conservation, Ministry of Primary Industries, Ministry of Transport, The Treasury, Environmental Protection Authority and Maritime New Zealand (MNZ). The Department of Prime Minister and Cabinet and Te Puni Kōkiri have been informed of the proposals in this paper.

Financial implications

29. The financial implications of not adopting this proposal would result in BOI costs being paid for by the Crown for all future marine consent applications that are considered by a BOI. The total magnitude of these costs on an ongoing basis is unknown.

Compliance

Treaty of Waitangi

30. The Ministry consulted with Te Puni Kōkiri on policy documents. No negative implications for the rights and interests of Māori protected by the Treaty of Waitangi were identified.

Human Rights

31. There are no inconsistencies between the proposals in this paper and the Human Rights Act 1993.

Disclosure Statement

32. A disclosure statement has been prepared and is attached to this paper.

Privacy

33. There are no privacy implications associated with the Bill.

International standards

34. No implications for New Zealand's international obligations were identified.

LAC Guidelines

35. The Bill complies with the Legislation Design and Advisory Committee Guidelines on the Process and Content of Legislation.

Legislative implications

36. The Parliamentary Counsel Office has drafted the attached EEZ Act Amendment Bill 2018 for introduction into the House as soon as possible following Cabinet approval.

37. The amendment will bind the Crown, consistent with the existing EEZ Act.

Regulatory impact analysis

38. The Ministry for the Environment's Regulatory Impact Analysis Panel has reviewed the Regulatory Impact Summary (RIS) produced by the Ministry for the Environment. The Panel considers that the RIS meets the quality assessment criteria.

Recommendations

The Minister for the Environment recommends that Cabinet:

1. agree to amend the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act) to:
 - 1.1. enable the Minister for the Environment to recover costs associated with a Board of Inquiry (BOI) appointed under the EEZ Act on the basis described in this paper.
 - 1.2. include principles of cost recovery to be considered by the Minister on the basis described in this paper.
 - 1.3. enable the Minister to delegate to the Environmental Protection Authority (EPA) the power to recover costs of the BOI on his or her behalf.
 - 1.4. provide for costs incurred by the applicant, if unpaid, to constitute a debt to the Crown and be recoverable by the EPA on behalf of the Crown in any court of competent jurisdiction.
 - 1.5. provide that the Minister must, upon request by an applicant, provide an estimate of the costs likely to be recovered and that the Minister may delegate this function to the EPA.
 - 1.6. ensure that a publicly notifiable marine consent application for a section 20 activity lodged before the EEZ Act is amended in the matter set out above, is not subject to having costs incurred by the BOI recovered.
2. agree to introduce the EEZ Act Amendment Bill 2018, as attached, into the House as soon as possible following Cabinet approval.
3. note that the Minister for the Environment intends that the EEZ Act Amendment Bill 2018 goes through a short select committee process of 1-2 weeks.
4. invite the Minister for the Environment to share the EEZ Act Amendment Bill 2018 with the EPA.
5. authorise the Minister for the Environment to make minor policy and wording changes within the scope of the policy agreed by Cabinet.

Authorised for lodgement.

Hon David Parker
Minister for the Environment

Attachment 1: Impact Summary: Cost recovery of Boards of Inquiry appointed under the EEZ Act

Attachment 2: EEZ Act Amendment Bill 2018