



To Hon David Parker, Minister for the Environment Cc Minister Sage, Associate Minister for the Environment			Tracking #: 2018-B-04323
<u>Security Level</u>	In confidence and legally privileged	Number of Attachments	Three
Date Submitted:	2 March 2018	Response needed by:	7 March 2018
MfE Priority:	Urgent	Action Sought:	Decision

## Cost-recovery provisions for EEZ Boards of Inquiry: Options for progressing an amendment to the EEZ Act

### Key Messages

1. It is not possible for an amendment to the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act) to enable the recovery of costs associated with Boards of Inquiry (BOIs) to be passed before a marine consent application is lodged by Tamarind Resources on 9 March 2018.

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3. The purpose of this briefing is to seek your direction on options for progressing an amendment to the EEZ Act and provides you with further information about:

- advice you requested on transitional provisions,
- potential timeframes for progressing an amendment, and
- advice you requested about cost-control measures.

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7. Retrospective legislation is generally undesirable from a policy perspective. However, we consider that the risks of allowing the full cost of a marine consent to fall to the taxpayer outweigh the risks associated with retrospective legislation, because:
- **the risks and impacts of not recovering the costs are high.** Applications for oil and gas activities are usually relatively high profile. The activity would confer only private benefit, so we consider that it would be inequitable for the costs of the BOI to fall to the taxpayer, and we would expect a strong negative reaction from the public and Māori if this happened. We would also expect a negative reaction from industry, as such a response could impact their social licence to operate.
  - **there are mitigating factors around recovering costs retrospectively.** Namely, that the BOI process was intended to be cost-recoverable at its introduction and this amendment would correct a legislative error in making it so. Additionally, there is already a general understanding that marine consent processes under the EEZ Act are entirely cost-recoverable from applicants and this is supported by industry.

**We recommend recovery of costs incurred only from the time the amendment is passed**

8. If Tamarind's application is submitted on 9 March as expected, the full cost of the BOI will not be cost recoverable unless the amendment is applied retrospectively.
9. There is likely to be a strong negative reaction from the public, Māori and the industry if costs fall to the taxpayer. Targeted consultation was undertaken with the oil and gas and seabed mining industries. Five submissions were received, all of which fully supported the proposal to amend the EEZ Act to provide for the costs of a BOI to be fully recovered. However, submitters were not consulted on the potentially retrospective application of the legislation.
10. 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. Publicly notified oil and gas marine consent applications under the previous decision-making regime in the EEZ Act cost between \$450,000 and \$940,000.
11. A significant portion of the costs associated with notified marine consent applications are incurred during the hearing process as this often requires decision-makers to work full-time for several weeks. The hearing for Tamarind's application is likely to start in August 2018. If you decide to introduce an amendment that only recovers costs incurred from the date of commencement (indirectly retrospective), we consider it should come into effect no later than the start of the hearing in August so that the costs of the hearing can be recovered.
12. If you decide to pursue a retrospective option, we consider that it would be appropriate to carry out further targeted consultation with Tamarind. Tamarind fully supported an amendment to the EEZ Act to provide for cost recovery but was not consulted about its retrospective application. Tamarind is the only operator intending to submit an application before the amendment is passed, therefore we consider it is appropriate to limit this consultation to Tamarind only.
13. We have provided indicative timeframes for three options for progressing a Bill to amend the EEZ Act. The options available depend on whether you choose to include retrospective provisions and whether an expedited process is still desirable.
14. Appendix 2 provides indicative timeframes for the following options for progressing the Bill:
- Option 1: Introduce the Bill without any retrospective provisions.** This would mean the full cost of Tamarind's application would fall to the taxpayer but any future notified marine consent applications would be fully cost recovered under the new provisions.

- b. Option 2: Introduce the Bill with indirect retrospective effect on an expedited timeframe. This is our recommended option.** This would allow you to recover costs going forward from the point the amendment commences. No costs are expected to fall to the taxpayer if this option is expedited as the amendment would be in effect prior to the BOI being appointed for Tamarind's marine consent application (in late April).
- c. Option 3: Introduce the Bill with direct retrospective effect.** This would allow you to recover all the costs associated with a marine consent application that has already been lodged regardless of when the amendment comes into force. Therefore an expedited process would not be necessary. However, this is not recommended as it does not provide Tamarind with a reasonable opportunity to withdraw from the process (before costs are incurred) if it prefers not to proceed under the new cost recovery arrangements.
15. In order to progress the Bill on an expedited timeframe, you could:
- Seek to add the Bill to the list of urgent bills in the House to enable the Parliamentary Counsel Office (PCO) to draft in advance of Cabinet approvals.
  - Seek Cabinet approval for policy approvals and to introduce the Bill into the House at the same time.
  - Recommend a short select committee process for the Bill (1-2 weeks).
  - Take policy proposals direct to Cabinet instead of the Environment and Legislation Committee.
16. In order to recover any of the costs associated with the BOI for Tamarind's marine consent application, you will need to pursue Option 2 or 3 (as these have retrospective application). It is not possible to amend the EEZ Act prior to Tamarind lodging its application on 9 March.
17. We have recommended that you pursue Option 2 on an expedited timeframe so that the amendment is in effect prior to the BOI being appointed in April. This means that little or no costs would fall to the taxpayer. However, if you prefer not to proceed on an expedited timeframe, Option 2 could be progressed on a standard timeframe similar to Option 3. In which case, some costs are likely to fall to the taxpayer (i.e. those incurred between the time the BOI is appointed in April and when the amendment comes into effect) but the majority of the costs associated with the hearing would be recoverable.

#### **Cost-control measures**

18. In response to a previous briefing (REF: 2018-B-04184), you asked about cost-control measures. Schedule 4 of the EEZ Act provides the following in relation to BOI processes:
- the EPA must provide support to the board and *"...have regard to the purposes of minimising costs and avoiding unnecessary delay when performing its functions..."*
  - the Board of Inquiry must—
    - carry out its duties in a timely and cost-effective manner;*
    - conduct its inquiry in accordance with any terms of reference set by the Minister under section 52(2);*
    - have regard to the most recent estimate provided to the board of inquiry by the EPA under clause 3(b) [an estimate of the amount of funding required to process an application].*

The relevant provisions are appended (Appendix 3).

19. We consider that these measures together will sufficiently control costs for the BOI process, and we don't propose to make any broader changes to the Act through this amendment.

**Next steps**

- 20. Once we have received confirmation of your preferred option and process, we will provide your office with a Cabinet paper by Tuesday 13 March to seek approval from Cabinet for the proposals set out in this paper.

**Recommendations**

21. We recommend that you:

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- b. **Note** that it is not possible to amend the EEZ Act prior to Tamarind submitting its marine consent application
- c. **Either** progress an amendment that does not apply to applications already lodged (not retrospective) (Option 1) Yes/No
- d. **Or** progress an amendment that allows you to recover the costs of a BOI from the date on which the amendment commences (indirectly retrospective) (Option 2). This is our preferred option Yes/No
- e. **Or** progress an amendment that applies retrospectively to all costs including those already incurred (directly retrospective) (Option 3) Yes/No
- f. **Agree to** progress the amendment on an expedited timeframe Yes/No

22. If you agree to 21 d. or e.:

- g. **Agree** that officials will carry out targeted consultation on the proposal with Tamarind Yes/No

**Signature**



John Robertson  
Director (acting)  
Marine, Environmental Risk and Science

2/2/18



Hon David Parker  
Minister for the Environment

5/3/18

Date

### Ministry for the Environment contacts

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## Appendix 2: Timing options

	Option 1 (No retrospective application)	Option 2 (Indirect retrospective legislation progressed – expedited timeframe)	Option 3 (Direct retrospective legislation progressed – standard timeframe)
Minister's response required	Wed 7 Mar	Wed 7 Mar	Wed 7 Mar
Officials consult with Tamarind	N/A	Thurs 8 – Fri 9 Mar	Thurs 8 – Fri 9 Mar
Cabinet paper provided to Minister's office	Tues 13 Mar	Tues 13 Mar	Tues 13 Mar
Coalition partner consultation (1 week)	Tues 13 – 20 Mar	Tues 13 – 20 Mar	Tues 13 – 20 Mar
Cabinet paper lodged	Thurs 22 Mar	Thurs 22 Mar (seeking approval of policy decisions and introduction into the House)	Thurs 22 Mar
Cabinet Committee (ENV / CBC)	Mon 26 Mar (CBC)	N/A	Mon 26 Mar (CBC)
Cabinet approval	Tues 3 Apr	Mon 26 Mar	Tues 3 Apr
PCO drafting	By Fri 13 Apr	Occurs in tandem with above	By Fri 13 Apr
BORA vetting	By Fri 27 Apr	Occurs in tandem with above	By Fri 27 Apr
LEG paper provided to office	Thurs 3 May	N/A	Thurs 3 May
Coalition partner consultation (1 week)	Wed 2 - 9 May	N/A	Wed 2 - 9 May
Cabinet paper lodged	Thurs 10 May	N/A	Thurs 10 May
LEG committee	Thurs 17 May	N/A	Thurs 17 May
Cabinet approval of Bill	Mon 21 May	Mon 26 Mar	Mon 21 May
Bill introduced to House	To be advised	On list of urgent Bills	To be advised
Select Committee consideration	1 -2 weeks	1-2 weeks	1 – 2 weeks

### Appendix 3: Relevant provisions of the EEZ Act

**Schedule 4 of the EEZ Act** provides for the EPA to provide information, support and advice to the board of inquiry, describes how a board must carry out its duties, sets out the hearings process, and provides that the board is to produce a report.

**Clause 2** of the schedule provides that:

- (1) *The EPA must provide all reasonable administrative and secretarial services that are necessary to enable a board of inquiry to discharge its functions and responsibilities under this Act.*
- (2) *The EPA may—*
  - (a) *make decisions regarding administrative and support matters that are incidental or ancillary to the conduct of an inquiry under this schedule; or*
  - (b) *allow the board of inquiry to make those decisions.*
- (3) *The EPA must have regard to the purposes of minimising costs and avoiding unnecessary delay when performing its functions under subclause (2)(a) or (b).*

**Clause 4** of the schedule provides that

*A board of inquiry must—*

- (a) *carry out its duties in a timely and cost-effective manner;*
- (b) *conduct its inquiry in accordance with any terms of reference set by the Minister under section 52(2);*
- (c) *have regard to the most recent estimate provided to the board of inquiry by the EPA under clause 3(b) [an estimate of the amount of funding required to process an application].*

**Clause 14** of the Schedule also sets out remuneration provisions for a board of inquiry thus:

- (1) *The Fees and Travelling Allowances Act 1951 (the 1951 Act) applies to a board of inquiry appointed under section 52 as if the board were a statutory board within the meaning of the 1951 Act.*
- (2) *The Minister may direct that a member of a board of inquiry be paid the following out of money appropriated by Parliament for the purpose:*
  - (a) *remuneration by way of fees, salary, or allowances under the 1951 Act; and*
  - (b) *travelling allowances and travelling expenses under the 1951 Act for time spent travelling in the service of the board.*