



To Hon David Parker, Minister for the Environment			Tracking #: 2018-B-04441
<u>Security Level</u>	In confidence	Number of Attachments	Cabinet paper 2018-C-04248 Impact Summary EEZ Act Amendment Bill 2018
Date Submitted:	29 March	Response needed by:	4 April
MfE Priority:	Urgent	Action Sought:	Referral

Amending the EEZ Act to provide for recovery of BOI costs – Cabinet paper and cost control advice

Key messages

1. This briefing is a cover note to the attached Cabinet paper (18-C-04248) which seeks Cabinet approval to amend the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act) to provide for recovery of costs associated with a Board of Inquiry (BOI).
2. The Cabinet paper seeks approval for policy proposals and to introduce an EEZ Amendment Bill (“the Bill”) into the House as soon as possible following the Cabinet meeting.
3. We suggest the Cabinet paper is lodged on 5 April 2018 for the Cabinet meeting on 9 April 2018.
4. Up to 75 percent of the total cost estimated for the Tamarind marine consent application will not be recoverable. Based on cost estimates provided by the EPA, we estimate this to be approximately \$660,000. These costs will be borne by the Ministry for the Environment.
5. This briefing also provides you with information you requested about ensuring those incurring costs have a duty not to incur excessive costs.
6. Our advice is that the duty you seek is provided for by the existing provisions of the Act and the proposed drafting of the amendment but you can set further cost-control expectations in the terms of reference for a BOI.
7. If you want to change or strengthen cost-control provisions, the EEZ Act would need to be amended.

Preventing excessive costs under existing provisions and proposed amendments to the EEZ Act

8. In relation to costs incurred by the EPA in providing administrative support to the BOI, Schedule 4 of the EEZ Act sets out that the *EPA must have regard to the purposes of minimising costs and avoiding unnecessary delay when performing its functions.*
9. In relation to costs incurred by the BOI in carrying out its duties, the BOI must do so *in a timely and cost-effective manner.*
10. The proposed amendment to the EEZ Act also includes a requirement that the Minister, or the EPA on behalf of the Minister, is only able to recover the *actual and reasonable costs* incurred by a BOI.

Terms of reference for a BOI

- 11. Under the existing provisions of the EEZ Act, you may set terms of reference about administrative matters relating to an inquiry and the BOI must conduct its inquiry in accordance with these terms.
- 12. The terms of reference and the BOI appointment letters will be drafted for your approval once board members have been selected and agreed at Cabinet.
- 13. You may wish to use the terms of reference to further impose a duty on board members not to incur excessive costs. If preferable, we will provide you with some suggested text for inclusion in the terms of reference.

Ability to challenge costs

- 14. Under section 101 of the EEZ Act, applicants may object to a decision by the EPA or BOI to commission a review or to seek advice. Applicants may also seek judicial review of charges, as was done by Chatham Rock Phosphate following the EPA decision on its marine consent application (further information provided in supporting material).
- 15. We consider that the existing provisions which restrict cost-recovery to actual and reasonable costs and that require a board of inquiry to carry out its duties in a timely and cost-effective manner—together with the provision for you to set expectations for the board in its terms of reference—will be adequate to ensure that excessive costs are not incurred.
- 16. If you are not satisfied that the provisions are currently sufficient, you could amend the EEZ Act to strengthen them. Such an amendment would require further consideration and consultation with stakeholders. Given that there is considerable risk involved in delaying the enactment of cost-recovery provisions, we don't recommend that you make further changes in the currently proposed EEZ Act Amendment Bill 2018.

Recommendations

17. We recommend that you:

- a. **Note** the attached Cabinet paper seeks approval for policy proposals and to introduce an EEZ Amendment Bill into the House as soon as possible following the Cabinet meeting. Yes/No
- b. **Agree** to seek Cabinet approval for policy proposals and to introduce an EEZ Amendment Bill Yes/No
- c. **Sign and lodge** the attached Cabinet paper Yes/No
- d. **Note** the existing cost control provisions under the EEZ Act Yes/No
- e. **Agree** not to include additional cost control provisions under the proposed EEZ Act Amendment Bill 2018 Yes/No
- f. **Either** agree to include cost control measures in the terms of reference for boards of inquiry Yes/No

- g. Or meet with officials to discuss options for strengthening cost control provisions under the EEZ Act

Yes/No

Signature

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29/3/18

Hon David Parker
Minister for the Environment

Date

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Appendix 1: Supporting material

Disputed EPA costs: Chatham Rock Phosphate consent application

18. In 2015 the EPA declined an application by Chatham Rock Phosphate (CRP) for marine consent to begin rock phosphate mining in the Chatham Rise. The application was filed in May 2014, and was open for public submission between 12 June and 10 July 2014. The application was heard over 26 sitting days starting 25 September 2014, with the hearing concluding on 19 November 2014 and the decision given on 11 February 2015.
19. The EPA sought recovery of a total of \$2,694,599.45 in costs from the applicant. Invoices were issued monthly and, between April and December 2014, paid by the applicant. CRP disputed some of the charges and refused to pay the remaining balance invoiced, a sum of \$795,310.05 (incl. GST).
20. The EPA undertook a review of the costs which had been charged to CRP, and accepted that there were some charges which should not have been billed to CRP (though a much smaller sum than CRP had disputed). The EPA provided its review on 6 November 2015. It issued a credit note for \$38,052.27. CRP was not satisfied with the review and did not pay the charges remaining.
21. EPA sought a summary judgement – the normal court process for recovering debt – for the balance of fees owing.
22. CRP contended that \$352,413.41 (excl. GST) of the invoiced amount reflected costs that were not reasonably incurred by the EPA, and/or were not incurred in performing its functions or providing services under the Act. The company additionally disputed \$532,135.95 (excl. GST) of costs it had already paid which it said should not have been charged. Part of the argument was that while the EPA was to recover so much of the direct and indirect costs incurred in performing its functions and providing services under the EEZ Act as are not provided for by money appropriated by Parliament for the purpose (s 143(1)), money *had* been appropriated by Parliament for the purpose of making marine consent decisions in 2014/15.
23. On 2 September 2016, Associate Judge Smith found that it was not open to CRP to *challenge the lawfulness of costs charged to it...by pleading the unlawfulness in its defence to a civil claim brought by the EPA for recovery of its costs*, but adjourned the summary judgment application to allow CRP to commence proceedings for judicial review.
24. CRP sought a judicial review of charges totalling \$853,246, and obtained an interim order staying the EPA's application for summary judgment pending the application for judicial review. CRP sought to establish that the charges were unlawful on the grounds that—
 - the EPA failed to take account of money said to be appropriated by Parliament and available to meet the costs of the application
 - the EPA failed to comply with section 143(1) of the EEZ Act and regulation 4 of the *Exclusive Economic Zone and Continental Shelf (Fees and Charges) Regulations 2013* to the extent that certain charges were not reasonably incurred, were not actually incurred, or were not reasonable in their amount.
25. The judicial review case was heard before the High Court in March 2017. Justice Clark did not find that the charges were unlawful, and dismissed the application for judicial review on 11 December 2017.