

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

## Section 1: General information

### Purpose

Ministry for the Environment (MfE) is solely responsible for the analysis and advice set out in this Regulatory Impact Statement, except as otherwise explicitly indicated. This analysis and advice has been produced for the purpose of informing:

- final decisions to proceed with a policy change to be taken by or on behalf of Cabinet

### Key Limitations or Constraints on Analysis

- The scope is limited to resolving a legislative error related to the cost recovery provisions for Boards of Inquiry (BOI) appointed under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act) that occurred when the EEZ Act was amended in 2017 as part of a broader reform of resource management legislation (Resource Legislation Amendment Act (RLAA)). This has resulted in a misalignment between what Cabinet intended when it approved proposals to align the decision-making process under the EEZ Act with the RMA, and the legislation.
- A resolution is urgently required as an application for a marine consent (for which a BOI will be convened) has already been lodged with the Environmental Protection Authority (EPA). The costs incurred by the BOI for this application will fall to MfE as retrospective legislation was not progressed as an option following Ministerial direction. If no action is taken, the costs incurred by BOI's on future marine consent applications under the EEZ Act will also fall to MfE. In which case, the costs incurred by the BOI would need to be paid out of money appropriated by Parliament for that purpose and would not be recoverable from an applicant.
- 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 Resource Management Act 1991 (RMA), the average cost recovered from an applicant is \$1.66 million. Publicly notified marine consent applications determined by a decision making committee (DMC) appointed by the EPA under the previous regime in the EEZ Act cost applicants between \$450,000 and \$2 million. The most significant cost of a notified marine consent application is associated with the hearing as decision-makers are usually required to work full-time for several weeks.
- Activities restricted by the EEZ Act confer only private benefit and it is inequitable for the costs of the BOI to fall to MfE. This is likely to incur a strong negative reaction from iwi and the public if this happens.
- The scope has been limited to deal only with this issue and a targeted and brief consultation has been undertaken with those stakeholders likely to undertake activities in the EEZ that are restricted in the EEZ Act. Submissions were sought from the seabed mining and oil and gas industries about the proposal to amend the EEZ Act to provide for

recovery of costs associated with a BOI appointed by the Minister. Five were received and all were in support of the proposal.

**Responsible Manager (signature and date):**



29/3/18

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## Section 2: Problem definition and objectives

### 2.1 What is the policy problem or opportunity?

- In April 2017, the EEZ Act was amended as part of the 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, such as petroleum development and seabed mining.
- Prior to the amendment, all publicly notified marine consent applications were processed and determined by a decision-making committee appointed by the EPA. The EPA is responsible for implementing the EEZ Act including deciding applications for marine consents (other than those that fall to a BOI), providing administrative support to BOIs, monitoring compliance with the Act, and enforcing its requirements.
- The government in 2015 introduced the policy of a BOI process in the EEZ Act to align decision-making processes under the EEZ Act with nationally significant proposals under the Resource Management Act 1991 (RMA). Cabinet approved this policy and the EEZ Act was amended as part of the RLAA. However, under the RMA, the Minister for the Environment can recover the actual and reasonable costs of a BOI from an applicant and can delegate the cost recovery function to the EPA.
- When the EEZ Act was amended, it did not include the equivalent cost-recovery provisions. Therefore, while the costs incurred by the EPA in providing support to a BOI is cost recoverable, there is no provision for the Minister to recover the actual and reasonable costs incurred by the BOI from an applicant.
- The costs incurred by the BOI would need to be paid out of money appropriated by Parliament for that purpose and would not be recoverable from an applicant.
- The EPA has received an application for a publicly notifiable marine consent application, for which the Minister must appoint a BOI. The BOI is likely to be appointed in May 2018. Therefore the costs incurred by the BOI for this particular application will fall to MfE (estimated to be up to \$660,000). The EPA will still be able to recover from the applicant its costs in supporting the BOI.
- Applicants for marine consents that continue to be determined by the EPA (e.g. non-notified applications, discharge and dumping activities etc.) will pay the full costs of processing and determining the application, while applicants for notified oil and gas or seabed mining activities determined by a BOI (which are likely to be more complex, controversial and time-consuming) will only pay the costs of the EPA's support functions under the Act. This creates a disparity between the scale of the application and the level of costs recovered.

### 2.2 Who is affected and how?

- 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.
- Previous publicly notified oil and gas marine consent applications decided by the EPA

under the EEZ Act cost applicants between \$450,000 and \$940,000.

- The direct costs associated with remunerating a BOI or decision-making committee represents about 23 percent of the cost. There are also indirect costs that will be incurred by the BOI which include costs such as those associated with external legal or technical advice. There is some uncertainty around the proportion of costs that relate to the EPA's function in supporting the BOI (which are cost recoverable) versus the indirect costs that the EPA incurs on behalf of the BOI. However, the Ministry for the Environment (MfE) and EPA have estimated this to be approximately 25 percent and 52 percent respectively. This means that up to 75 percent of the total cost of an application is currently unrecoverable from the applicant.
- If the EEZ Act is not amended, the direct and indirect costs incurred by a BOI for all publicly notifiable applications will ultimately fall to MfE.
- Targeted consultation on the proposal to amend the EEZ Act was undertaken with those stakeholders who may, in the future, require marine consents for publicly notifiable activities that are now subject to a BOI process. Seven representatives from the oil and gas and seabed mining industries were contacted.
- Five submissions were received. All submitters supported the proposal to amend the EEZ Act to provide for the Minister to recover the costs incurred by a BOI appointed under the EEZ Act.

### **2.3 Are there any constraints on the scope for decision making?**

- The scope is limited to resolving a legislative error related to the cost recovery provisions for Boards of Inquiry appointed under the EEZ Act.
- Under the EEZ Act, the Minister must appoint a BOI to decide an application for a section 20 activity (e.g. oil and gas, and seabed mining activities). One such application has already been lodged and the BOI is expected to be appointed in May 2018. The EEZ Act needs to be amended urgently before any other marine consent applications are lodged that require a BOI.

## Section 3: Options identification

### 3.1 What options have been considered?

The criteria for assessing options are:

- Decision-making processes under the EEZ Act are aligned with the RMA as per the original policy approved by Cabinet and the Minister's cost recovery powers under the EEZ Act are aligned with the RMA
- Provides for all costs that are recoverable to be commensurate with scale of application
- Provides for applications that are matters of private rather than public benefit to be fully cost recovered

The criteria cannot be addressed through any non-regulatory options as there is a gap in the current legislation in relation to cost recovery of BOI that needs to be addressed. Given the Minister *must* appoint a BOI for applications for publicly notifiable section 20 activities (section 52 of the EEZ Act); options to defer to a different decision-making model (e.g. the EPA) are also not available.

Therefore the two options considered are:

1. Status quo – costs associated with a BOI appointed by the Minister will not be recoverable under the EEZ Act.
2. Introduce an EEZ Act Amendment Bill to align cost recovery provisions in the EEZ Act with those in the RMA to:
  - a. Provide for the costs of BOI to be recoverable by the Minister having regard to cost recovery principles
  - b. Provide for the Minister's cost-recovery power to be delegated to the EPA
  - c. Provide that any charges by an applicant for the costs of a BOI that are not paid constitute a debt to the Crown and are recoverable by the Minister or the EPA in any court of competent jurisdiction

#### **Option 1**

Benefits:

- None

Risks:

- Does not address any of the criteria
- Costs incurred by a BOI for all future notified marine consent applications will fall to MfE and the EPA. It is unclear what proportion of the total cost of a marine consent application would fall to MfE and the EPA and how those would be funded or the opportunity costs resulting from that
- Likely to provoke a strong negative reaction from iwi, stakeholder and the public as applications are for private benefit but are not being cost recovered.

- Likely to impact an operators social license to operate if public perception is that the operator has benefited from the legislative error

### **Option 2**

#### Benefits:

- Avoids costs of a BOI for applications under the EEZ Act falling to MfE (except those already lodged before the amendment comes into force)
- Strengthens Cabinet approval to align decision-making under the EEZ Act with the RMA
- Resolves discrepancy between the publicly notified section 20 activities and other consent application processes in the EEZ Act
- Achieves policy intent that private ventures are fully cost recovered

#### Risks:

- The EPA has already received an application for a publicly notified marine consent for which the Minister must appoint a BOI. This means that the costs incurred by the BOI for this particular application will fall to MfE. The direct costs associated with paying Board members and reimbursing travel costs will be funded by MfE. It is not yet clear how other indirect costs such as legal advice for the BOI will be funded.
- This risk is considered to be of relatively minor consequence in that it is limited to one application that is likely to incur reasonably minor costs (compared with applications for seabed mining under the EEZ Act or nationally significant proposals under the RMA).

### **3.2 Which of these options is the proposed approach?**

- Option 2 is the only feasible option as a regulatory fix is needed to address the gap in the legislation.
- From the time the marine consent process was introduced via the EEZ Act in 2013, it was intended to be a user-pays system. Applications were considered to be matters of private rather than public benefit and therefore were subject to full cost recovery. All applications that have been processed through the EEZ Act since its introduction in 2013 have been fully cost recovered from applicants.
- Cost recovery is supported by submissions received as part of the targeted consultation that was undertaken. The submissions recognise that cost-recovery was anticipated when the RLAA was brought into force in June 2017, and the inability to charge and recover costs because of the legislative error as currently drafted does not align with the government's policy intent.
- Given the Minister must appoint a BOI to determine applications for publicly notifiable section 20 activities, the status quo is not appropriate and does not meet any of the criteria outlined.

## Section 4: Impact Analysis (Proposed approach)

### 4.1 Summary table of costs and benefits

Affected parties ( <i>identify</i> )	Comment: nature of cost or benefit (eg ongoing, one-off), evidence and assumption (eg compliance rates), risks	Impact <i>\$m present value, for monetised impacts; high, medium or low for non-monetised impacts</i>
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Additional costs of proposed approach, compared to taking no action		
Regulated parties	Unclear of exact cost as this is a new process under the EEZ Act. Costs provided are the direct and indirect costs incurred by a BOI that would be recoverable from the applicant that are not currently. Estimate based on 75 percent of the average cost of a BOI process for a nationally significant proposal (\$1.6 million).	Medium  Up to \$1.2 million
Regulators	Cost to EPA when recovering costs on behalf of the Minister	Low
Wider government	Costs for MfE associated with progressing an EEZ Act Amendment Bill	Medium
Other parties	N/A	N/A
<b>Total Monetised Cost</b>		<i>Approx. up to \$1.2 million</i>
<b>Non-monetised costs</b>		<i>Low - Medium</i>

Expected benefits of proposed approach, compared to taking no action		
Regulated parties	Less likely to incur a negative reaction from public – reputational benefits	High
Regulators	Consistent and fair treatment of all applicants for cost recoverable activities. Greater efficiency - standard policies and procedures can be applied as repeatable processes.  Minimises the risks of the distinction between non-recoverable (BOI costs) and recoverable (BOI servicing) costs being challenged  Eliminates the risk of the EPA having to absorb or subsidise the cost of a private benefit application	High
Wider government	Costs of marine consent applications do not fall to MfE and EPA but to those who will benefit from the consent.  Unclear of exact cost as this is a new process under the EEZ Act. Costs provided are the direct and indirect costs	Medium to High  Up to \$1.2 million

	incurred by a BOI that would be recoverable from the applicant that are not currently. Estimate based on 75 percent of the average cost of a BOI process for a nationally significant proposal (\$1.6 million).	
Other parties	N/A	N/A
<b>Total Monetised Benefit</b>		<i>Approx. up to \$1.2 million</i>
<b>Non-monetised benefits</b>		<i>Medium - High</i>



#### 4.2 What other impacts is this approach likely to have?

Not applicable

## Section 5: Stakeholder views

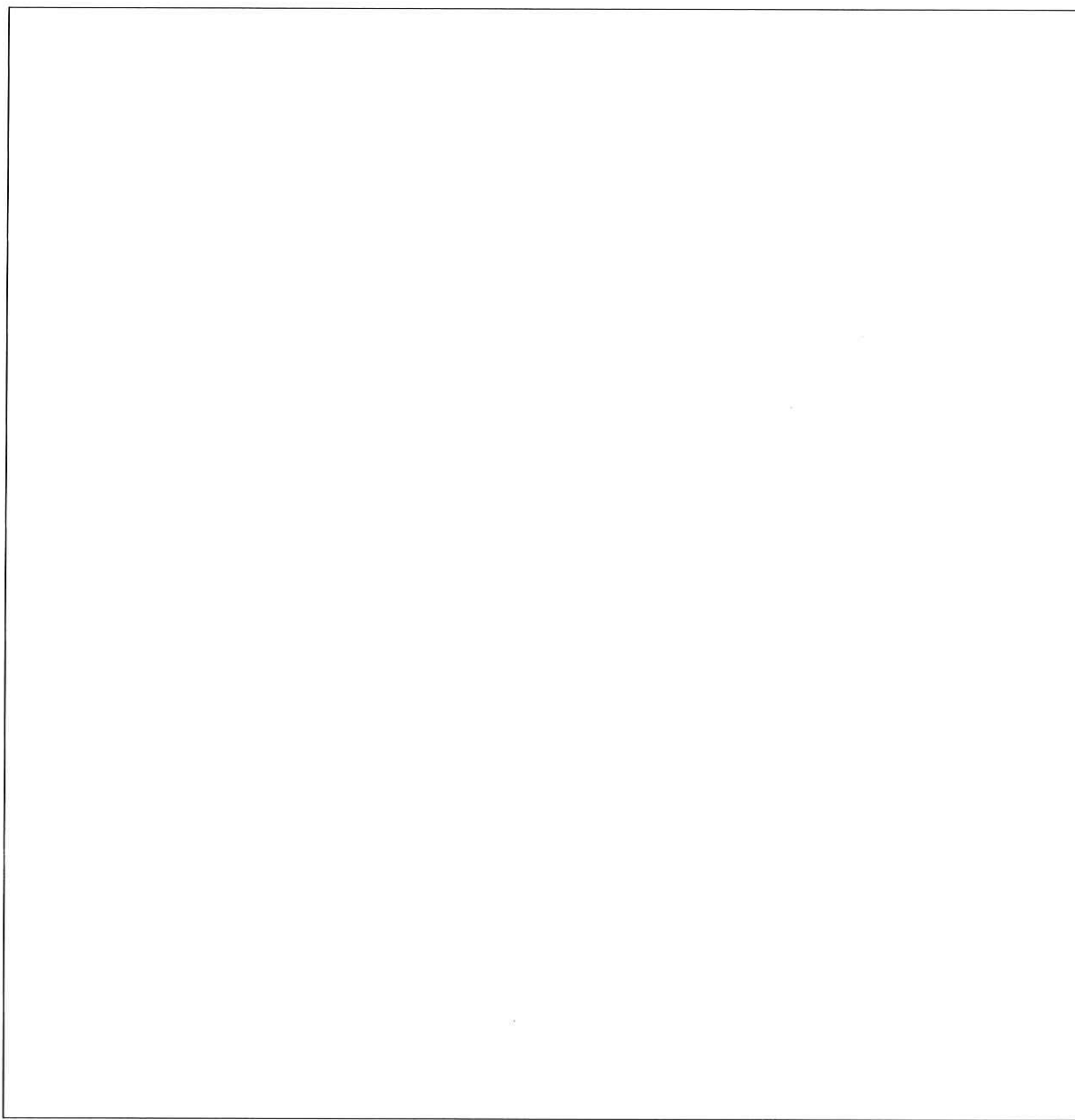
#### 5.1 What do stakeholders think about the problem and the proposed solution?

- Seven representatives from the oil and gas, and seabed mining industries who may, in the future, require marine consents for publicly notifiable activities that are now the subject of a BOI process were contacted and asked to provide feedback on the proposals.
- Due to time constraints, the consultation period was brief (3 days) but as the proposal was not complex or likely to be controversial, this was considered adequate and preferable to not undertaking any consultation.
- Five submissions were received. Four fully supported the proposal and one supported it but had no specific comment to make on the proposal. Given the limited scope of the proposal, a longer consultation period would have been unlikely to yield any further information but it may have enabled those that did not submit with sufficient time to respond.
- Some submitters suggested there could be further amendments made to the Act at the same time to resolve other operational issues. However, these were out of scope and would require further analysis and wider consultation which would delay the timeframe for addressing this particular urgent issue. It is more appropriate that these be addressed as part of a wider review of the EEZ Act which is anticipated to be commissioned towards the end of 2018.

## Section 6: Implementation and operation

### 6.1 How will the new arrangements be given effect?

- The policy proposals and the EEZ Act Amendment Bill 2018 will be taken to Cabinet to approve. As soon as possible following this, the Bill will be introduced to the House.
- It is intended that the amendments come into effect as soon as possible but timing is dependent on the process and how long it takes for the Bill to pass through the House.
- Transitional provisions will need to be included in the Bill to ensure that any applications already lodged will be allowed to continue under the existing provisions that are in place at the time the application is lodged.
- Potential applicants are aware of this issue but are likely to have contractual obligations that must be met. Therefore delaying the lodgement of an application until the Bill comes into effect is unlikely.



## Section 7: Monitoring, evaluation and review

### 7.1 How will the impact of the new arrangements be monitored?

- The costs expected to be incurred by applicants for BOI processes will continue to be estimated and monitored by the EPA.
- MfE will continue to monitor the effectiveness of the regulatory system which includes the EEZ Act. Of particular relevance is how decision-makers (including BOI) are appointed, and the time and costs associated with determining applications.

### 7.2 When and how will the new arrangements be reviewed?

- The Ministry has a responsibility in its regulatory stewardship role to monitor, review and report on regulatory systems.
- Any functions relating to Boards of Inquiry would be monitored, evaluated and reviewed as part of the wider EEZ Act framework. This includes monitoring the ongoing performance of the system and reviewing it at appropriate intervals to determine whether it is still fit for purpose.
- MfE will work with the EPA to monitor implementation of the new provisions and to understand any operational issues.