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6 June 2018

Ms Deborah Russell
Chair, Environment Committee
Parliament Buildings
Wellington

By email: en@parliament.govt.nz

Dear Ms Russell

Re: Exclusive Economic Zone and Continental Shelf (Environmental Effects) Amendment Bill

1. Introduction

1.1 The New Zealand Law Society understands the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Amendment Bill (Bill) is currently being considered by the Environment Committee.

1.2 As your committee will be aware, the Bill was introduced on 3 May, had its first reading on 8 May and, after the first reading, a motion was passed that the normal select committee process (which includes public consultation) be truncated and the Bill reported back to the House by 11 June.[1] The committee staff have however indicated that the Law Society is welcome to write to the committee, and we appreciate the opportunity to make the following comments on the Bill.

2. Overview

2.1. The Bill amends the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (Act) to allow cost recovery in relation to a Board of Inquiry (BOI) appointed under the Act to decide a marine consent application. The explanatory note to the Bill states that this will align BOI cost recovery with Environmental Protection Authority (EPA) cost recovery processes under the Act, as well as with BOI cost recovery processes under the Resource Management Act 1991 (RMA).

2.2. The Law Society notes, however, that the proposed new BOI cost recovery provision (new section 52A) differs from that set out in both the Act and the RMA, and that there is a lack of clarity within the Bill, and lack of alignment between, the Bill, the Act and RMA cost regimes. The Law Society considers a greater degree of alignment is appropriate and provides the following comments and recommendations.

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[1] On the grounds that the amendment is considered to be a minor technical correction of a drafting error in the Resource Legislation Amendment Act (which came into force in early 2017).

3. Lack of clarity around cost recovery provisions to apply

3.1. Proposed section 52A, in clause 5 of the Bill, sets out what BOI costs can be recovered, that an applicant can request an estimate of costs, the criteria the Minister is to consider when recovering costs, that costs are a debt due to the Crown, and that the Minister can delegate his or her functions, powers and duties under this section to the EPA.

3.2. Proposed section 52A appears intended to be a standalone BOI costs provision such that the other cost recovery provisions in sections 143 to 147 of the Act will not apply. However, that is not completely clear, given sections 143 to 147 address cost recovery matters that proposed section 52A does not.[2] It also includes different criteria relating to the degree of public benefit, which is discussed further at [4.1] – [4.4] below.

3.3. It is also noted that proposed section 52A only deals with costs incurred in relation to a BOI; it does not explicitly address whether the EPA's costs associated with any BOI process (or the costs of any other participant for that matter) can also be recovered. But the implication is that what may be recovered is the Minister's costs in relation to a BOI, particularly if this provision is contrasted with the parallel provision in the RMA.[3]

3.4. If the intention is to align the BOI and EPA cost recovery processes and enable the recovery of both BOI and EPA costs under the new section, proposed section 52A should be amended to clarify that the existing cost recovery provisions in sections 143 to 147 of the Act apply except to the extent that they have been amended by proposed section 52A. An alternative approach would be to delete proposed section 52A and instead amend the relevant parts of sections 143 to 147 of the Act to confirm that these also apply to BOI costs currently borne by the Minister.

4. Cost recovery criteria

4.1. While the cost recovery regimes under the Bill and the RMA both include criteria relating to the purpose of cost recovery and the extent to which any activity by the applicant reduces the costs to the Minister,[4] the RMA also requires that regard be had to one additional criterion: that the applicant should be required to pay for costs only to the extent that the benefit of the actions by the Minister are obtained by the applicant as distinct from the community as a whole.[5]

4.2. The rationale for not including this additional criterion in proposed section 52A is not clear. However, the explanatory note to the Bill states that "a process conferring a private benefit (the marine consent process for section 20 activities) results in a private, rather than a public, cost". This appears to imply that *all* section 20 marine consent applications involve private as opposed to public benefits. While many marine consent applications may be made primarily or even solely for private benefit, there will be instances when an application confers a greater or lesser degree

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2 Such as charges only applying to the extent Parliament has not appropriated money for those purposes, charges relating to a financial year, that charges may be prescribed by regulation etc.

3 Section 149ZD of the RMA makes express provision for recovery of local authority and EPA costs associated with the BOI process as well as BOI costs.

4 Refer proposed section 52A(3) of the Bill and section 149ZD(6)(a) and (c) of the RMA.

5 Refer section 149ZD(6)(b).

of public benefit or may even primarily be for public benefit. An example of the latter could be the submarine pipelines which contain telecommunication cables.

4.3. Further, as referenced briefly above, under the existing EPA cost recovery provisions in the Act the Minister is required to consider who benefits (applicant, public etc) from the performance of a function or service.[6]

4.4. Given that both the existing EPA and RMA cost recovery provisions require consideration of the extent of any public benefit, it would be more consistent and appropriate if the Minister in seeking to recover BOI costs was required also to have regard to the degree of public benefit (if any) associated with the application.

4.5. In the absence of such a change, the applicable cost recovery criteria would depend on whether a BOI was appointed to hear an application, rather than any specific features of the application itself. For cross-boundary (EEZ/RMA) activities this is particularly problematic, as the criteria applying to BOI cost recovery within coastal waters (under the RMA) and those applying outside coastal waters (under the Act) would not align. Further, as a BOI is only appointed to hear cross-boundary applications which are of national significance, it seems contradictory not to then consider the public benefit of such applications in cost recovery decisions.

5. Objections process

5.1. At present, and unlike the RMA,[7] there is no formal objections process enabling applicants to object to cost recovery assessments under the Act. While the Bill does not currently address the issue, the Law Society considers it would be useful if it did.

5.2. This is because the determination of costs involves matters of discretion (associated with the cost recovery criteria) as to what is reasonable, how the actions of an applicant has impacted costs, and (for EPA costs at least) the extent of benefit gained by the applicant and the public.

5.3. In the absence of any costs objection process, an applicant's only avenue to challenge costs is to seek a judicial review of the costs decision, such as occurred in the *Chatham Rock* case.[8] Judicial review actions are generally limited to challenges to the process followed (rather than a review of the overall merits) and can be expensive and time consuming for all parties involved (including the EPA and the Crown). Generally, only a portion of the costs associated with taking or defending such actions are recoverable.[9]

5.4. For these reasons, the Law Society considers that provision of an objection process within the Act itself would provide a more efficient and cost-effective avenue for cost decisions to be reviewed. An objections process could be based on a process similar to that followed under the RMA.[10]

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6 Refer section 143(3)(a).

7 Refer sections 357B to 358 of the RMA.

8 *Chatham Rock Phosphate Ltd v Environmental Protection Authority* [2017] NZHC 3076.

9 Scale costs apply in the High Court.

10 Refer sections 357C to 358 of the RMA.

6. Recommendations

6.1. The Law Society recommends the following changes be made to the Bill:

a) Amend proposed section 52A to:

i. clarify that the existing cost recovery provisions in sections 143 to 147 of the Act apply except to the extent that they have been amended by proposed section 52A; and

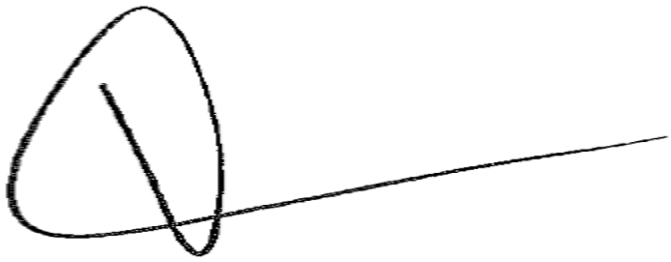
ii. add an additional criterion requiring the Minister to have regard to the degree of public benefit (if any) associated with the application.

b) In the alternative, delete proposed section 52A and amend sections 143 to 147 of the Act to confirm that these sections also apply to BOI costs.

c) Include new provisions which set out a process enabling BOI and EPA cost objections to be made, heard and determined under the Act. Any objections process could be based on a process similar to that followed under the RMA.

We hope the committee finds these comments helpful. If you have any questions please do not hesitate to contact us through the Law Society's Law Reform Manager, Vicky Stanbridge vicky.stanbridge@lawsociety.org.nz / 04 463 2912.

Yours sincerely



Andrew Logan
Vice-President