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Environmental Effects – All At Sea

In June 2008, Cabinet released its decisions on a proposed regime to regulate the environmental effects of activities within New Zealand's Exclusive Economic Zone ("EEZ"). Cabinet agreed to the drafting of an Exclusive Economic Zone Environmental Effects Bill ("the Bill"). Draft legislation is being prepared. Although Parliament has dissolved it is expected that all parties will pursue this legislation in the next Parliament.

If enacted, the proposed EEZ legislation will add another layer of regulatory requirements for current and proposed activities exploiting resources beyond the 12 nautical mile limit. Below we summarise the long and the short of the proposal.

The EEZ Proposal in Short

- The proposed EEZ legislation regulates activities in the EEZ. Its overall objectives for the EEZ are to:
 - regulate uses of resources to **protect the environment** from adverse effects
 - promote environmentally **sustainable development**
 - **reduce uncertainty** to investors operating in the area
- It introduces a Resource Management Act ("RMA") - style consent process for proposed activities and the use of resources within the EEZ. It also establishes an effects-based framework aimed at protecting the environment through a consent application process, required to be in line with **specified environmental outcomes**.
- The proposal includes provision of a policy statement (identifying high level environmental outcomes and bottom lines), regulations and a consent regime. However, it does not seek to create a single new regime to manage all activities within the EEZ. It does not attempt to "fill all the gaps". For example, the sustainability of non-renewable resources, will remain the concern of the Crown Minerals Act 1991 and Continental Shelf Act 1964. Compliance with other relevant legislation will still be required.
- Regulations made under the proposed EEZ legislation are intended to create **rules and standards** establishing activity status.
- Applicants must supply an **Impact Assessment Statement**.
- The proposed EEZ legislation will apply to both existing and new activity permit holders. Existing permit holders for activities taking place in the EEZ generally will not need to apply for consent until that permit expires. But if the conditions of the existing permit or approval are inconsistent with the EEZ legislation, a **transitional consent will be**

needed. This will potentially affect planned expenditure and proposed timeframes for undertaking an activity. Operators may have to adjust the current conditions of an existing permit, depending on environmental impact.

- Decision makers under the proposed EEZ legislation should apply a precautionary approach and must consider whether to use “**adaptive management tools**” to manage the risk of environmental damage. This may enable provisional short term and reversible decisions which are not consistent with security of tenure.
- The Crown is considering charging **royalties** for extraction of any non-renewable non-living resource in the EEZ and for which there is no current levy or royalty. There will also be a cost recovery regime for administration of the legislation.
- There is a regime of appeals, monitoring for non-compliance and, of course, penalties for breaches.

The following information provides a more detailed overview of the proposal. Despite the express desire for operators to have certainty, there are clear areas of the proposal that need clarification. Regardless of the lobbying that will occur around this proposal, it is certain that activities in the EEZ will never be as straight forward as they were previously. If you would like more information please contact us.

For those interested in the detail of what is proposed, please read on.

More Lengthy Details

Current law

Currently, New Zealand has the coastal state right to regulate the effects of activities in the EEZ under international law including the United Nations Convention on the Law of the Sea 1982. New Zealand also has obligations under international law to exercise its sovereign rights compatibly with the rights and freedom of other states over the area, such as the right to navigate and to lay submarine cables.

Currently, the environmental impacts of only a few activities in the EEZ are regulated by New Zealand law, such as fisheries and maritime transport. These activities will continue to be regulated by their existing legislation.

Purpose and principles of the proposed EEZ legislation

The purpose of the proposed legislation is to provide for uses of EEZ resources, and to regulate the effects of those uses to protect the environment and ensure that any uses (or the effects of those uses, in the case of non-renewable resources) are environmentally sustainable.

The decision-maker must also consider (amongst other things) the following environmental and information principles.

Decisions on policy, rules or on a consent application must contribute to or be not inconsistent with:

- ensuring the integrity of marine ecosystems
- maintaining biological diversity
- protecting vulnerable areas or ecosystems from the adverse environmental effects of activities
- avoiding, remedying or mitigating the adverse environmental effects of activities
- managing the cumulative effects of all activities on the receiving environment.

This is a narrower focus than that of the RMA, which includes matters such as amenity values. Given the limited human involvement with the EEZ, a biophysical definition for the unique EEZ environment was seen as more appropriate.

These objectives, particularly those noted in bullet (c) above, do not necessarily mean that areas should be shut off from use and activities prohibited outright.

The decision-maker will also have **discretion** to consider a number of other matters, including:

- the present and future economic, social and cultural wellbeing of New Zealand
- the relationship of Maori and their culture and traditions with their ancestral waters, sites, waahi tapu and other taonga
- kaitiakitanga
- the efficiency of any use of natural and physical resources
- existing uses, interest and values
- improving information and knowledge of the marine environment, including the effects of human activity on the environment
- effects on health and safety of people and communities.

However, Cabinet has stressed that these discretionary matters should not, either individually or collectively, outweigh the environmental objectives/principles listed above.

Information Principles and Precautionary Approach

Given the weight the proposal for EEZ legislation places on environmental protection, and because little is known about the EEZ environment, Cabinet has agreed that decision-makers under the EEZ legislation must apply the following information principles. The decision-maker must:

- take into account the best available information
- consider any uncertainty or insufficiency in the information available
- not defer decisions to protect the environment simply because information is unavailable or uncertain.

“**Best available information**” is not yet defined, though the Fisheries Act 1996 has such a definition. The information principles in the proposed EEZ legislation are similar to those in that Act so close reference to that Act can be expected.

The decision-maker will be required to exercise a “precautionary approach”. This means that decision makers are expected to be cautious, and favour environmental protection. In addition, decision makers also should not delay in taking measures to protect the environment when information is uncertain, unreliable, inadequate or unavailable.

Generally the onus of proof about the reliability of information will fall on the applicant/proponent of the activity.

Adaptive management

Cabinet suggests that the precautionary approach should not result in every activity in the EEZ being prohibited. Instead, the decision-maker should consider whether the risk of environmental damage from the activity can be controlled by taking an “adaptive management approach” – that is, “**learning by doing**”. The adaptive management approach is a tool for giving effect to the precautionary approach, not an alternative to it. It is not mandatory.

Adaptive management would allow, for example, the **decision-maker to grant provisional and reversible decisions**. This may involve granting consents subject to a staged process, measuring the effects of the activity along the way with stringent monitoring requirements and cancelling the consent if the adverse effects exceed set levels and cannot be remedied.

The decision-maker could also grant a short-term consent if the relevant activity is novel and has uncertain environmental effects, with the ability for the decision-maker to extend the terms as need be.

The negative aspect of this approach is, of course, uncertainty and a requirement to make significant investments without security of tenure via a long term resource consent. We expect submissions on the proposal to address this point.

The Cabinet proposal indicates that good information is essential. The Ministry may encourage applicants who wish to avoid the imposition of an adaptive management approach to provide comprehensive and reliable information about the risks of their proposed EEZ activity. It seems, however, that use of this approach is solely at the discretion of the decision-maker, not the applicant.

EEZ environmental regulations, rules and standards

The EEZ legislation is likely to be an “enabling” Bill with much of the operational detail contained in regulations. The regulations will contain the details of the RMA-style consent regime and set out:

- (a) **Rules:** setting thresholds that categorise an activity as either permitted, discretionary or prohibited, depending on its effects

- (b) **Standards:** the ongoing conditions with which an activity must comply to be permitted or discretionary. A regulation to manage the effects of dredge mining in the EEZ, for example, may set a standard requiring applicants to monitor marine mammals.

The Minister for the Environment (**Minister**) may publicly notify draft regulations and hear submissions on them. The Minister must also consult other relevant Ministers before finalising regulations.

The rules and standards may allow a lower level of effect, or may restrict activities which have specified effects. Regulations may be created which **prohibit certain activities** or any activities in particular areas (“closing” the area), but only if that regulation is consistent with the purpose and principles of the proposed EEZ legislation.

EEZ consents – types of activities (permitted, discretionary and prohibited)

If an activity is set out by regulation as **permitted** an EEZ consent will not be required, provided:

- its effects are both below the threshold in the rules and compliant with the standards
- the performance of the activity complies with any standards in the defined rule.

The EEZ Commissioner must still be notified of all new activities, even permitted ones. An activity must also comply with any other relevant legislation such as the Crown Minerals Act.

An EEZ consent will be required if the activity does not meet the permitted requirements outlined above or if the activity is discretionary. An activity will be **discretionary** if:

- its effects reach or exceed the threshold set out by the rules
- the cumulative effects of the activity and other activities in the area meet or exceed the threshold, or
- the activity would have a significant adverse effect on any existing defined interest (eg a resource consent or Treaty of Waitangi right etc).

Prohibited activities cannot be considered for an EEZ consent.

Impact Assessment Statements (IAS)

Operators will need to provide an IAS to undertake an activity in the EEZ which requires resource consent. This IAS must:

- describe all aspects and identify all effects of the activity on the environment. This should include the effects on other defined existing interests and anything else required by regulations
- correlate in size and detail to the size and significance of the effects of the proposed activity. An operator wishing to carry out invasive dredge mining along an entire coast,

for example, will have to provide more information than an operator planning to carry out a sample core survey in a small area. However, in all cases an applicant should provide as much detail in an IAS as possible as the EEZ Commissioner can either ask for further information or decline it outright

- (c) adequately identify effects on other interests or interested parties. Interestingly the Commissioner may direct the applicant and affected persons to meet or request that they enter into mediation if there might be significant adverse effect on the defined interests of another. However, there is no explicit consultation obligation in the proposed legislation
- (d) be sufficient to enable the consideration of:
 - (i) the actual or potential effects on the environment and other defined interests
 - (ii) any consultation undertaken with persons representing affected defined interests
 - (iii) any possible alternative locations or methods for undertaking the activity to help to avoid, remedy or mitigate any adverse effects.

Processing, approving/declining applications

After the EEZ Commissioner receives an application, he or she must publicly notify and directly notify persons and government agencies that the EEZ Commissioner considers will have an interest in the application.

Submissions on a consent application may be made by any person. The applicant or any submitter may request a hearing and give evidence in support. The Commissioner will consider the submissions and report back to the Minister and the Maori Advisory Panel ("the Panel") about the application along with a summary of submissions, consultation with government agencies and any independent audit.

Like the RMA, the Commissioner may commission (at the applicant's cost) such independent reports and review of the information provided as necessary. A consent application may not be accepted if it contains inadequate information.

The Commissioner then makes recommendations to the Minister on what decisions should be made on the application.

The Panel may also request an audit of an application's cultural impact assessment. They will also be to make recommendations direct to the Minister.

The Minister can decide to either approve a consent application, in whole or in part, with or without conditions, or decline it. In making a decision, the Minister must consider:

- (a) the principles and purpose of the Act
- (b) any relevant provisions in the policy statement or regulations

- (c) any submissions
- (d) the actual and potential environmental effects of the proposed activity, including:
 - (i) cumulative effects and those that may affect areas outside the EEZ
 - (ii) whether there will be a significant adverse effect on existing defined interests (unless the person has given written approval)
 - (iii) the nature of the area affected, including biodiversity and special values
 - (iv) any decisions relating to the area or resource that are made under any other Act or policy
 - (v) proposals to avoid, remedy or mitigate any adverse effects.

When making a decision the Minister must not consider trade competition issues.

"Significant adverse effect" is yet to be defined. Cabinet agreed that in determining whether adverse effects on defined interests are significant a decision maker will need to consider:

- (a) any relevant principles of international law
- (b) the effects of the proposed activity on the defined interest
- (c) the area that the proposed activity would have in common with the defined interest
- (d) the degree to which both the proposed activity and defined interests must be carried out to the exclusion of other activities
- (e) whether the defined interest can be exercised only in a particular area.

The Minister must decline the application on the grounds that it has significant adverse effects on defined interests (including Maori interests) unless the consent can be granted subject to conditions that avoid, remedy or mitigate the effects to the extent that they are no longer considered significant.

The EEZ Consent

An EEZ consent is proposed to be a personal right of the holder and neither legal nor personal property. It is transferrable only if conditions remain the same. The consent may endure for a maximum term of 35 years (which is the same under the RMA). The term, and its conditions, can be changed at any time upon application of the holder of the consent.

The Commissioner may review a consent where adverse effects have arisen that were not anticipated at the time of the decision, or where new information is available that would have materially influenced the decision on the consent had it been available at the time of the decision. The term of the consent and the conditions may be modified after review.

A consent can also be cancelled if:

- (a) the effects of the activity exceed the consent conditions and cannot be avoided or remedied
- (b) no material efforts have been made to exercise the consent in five consecutive years
- (c) review of the consent reveals information that, if known, would have resulted in the consent not originally being granted
- (d) cannot be addressed through modification of consent conditions; and/or repeated non-compliances with the conditions of consent.

Existing permits and transitional consents

We note that if the proposed legislation becomes law, there will be a lag between the date it is passed and the promulgation of regulations. It is proposed that until regulations are in place, all new activities in the EEZ will be deemed discretionary and require EEZ consent, in which case the EEZ Commissioner shall have the discretion not to notify those likely to have minor effects. What the Commissioner will consider a 'minor' effect is not currently defined by the proposal.

Holders of existing permits to carry out activities in the EEZ will not need to apply for consent until that permit expires unless the conditions of the consent are inconsistent with the EEZ legislation.

If conditions are determined inconsistent with the EEZ legislation the operator who holds the permit must obtain a "**transitional consent**". The transitional consent will require the operator to align its operations to be consistent with the EEZ legislation within five years of the transitional consent issue date. If the effects of the activity are minor then the Commissioner has a discretion to process the transitional consent as non-notified.

Operators should be aware that the **current conditions of any existing permit** may be adjusted depending on their environmental impact. There may be cost implications of going through a transitional consent process if the EEZ Commissioner decides they are inconsistent with the new regime. Operators need to bear in mind that the proposed regime may be in place within six months.

It may be prudent to make submissions on transitional provisions for those holding granted permits. These could seek more certainty about limiting the impact of the new Act on existing permits.

Also important to note is that there is no discussion in the Cabinet proposal about **priority of claims** over blocks of the ocean (competing applications). That is, what happens once the short term consent lapses – can a competitor quickly file an application and gain priority?

Appeals, monitoring, enforcement orders and penalties

Appeals will be made to the Environment Court by an applicant or anyone who has made a submission in respect of:

- (a) a consent
- (b) conditions to a consent
- (c) a review
- (d) enforcement orders
- (e) prosecutions

Appeals may be made from the Environment Court to the High Court and then higher Courts on points of law.

EEZ operators will be **monitored** to ensure they are complying with their rights and responsibilities, including reporting requirements. This will require operators to fulfil any reporting requirements required either by regulation or their consent, as well as comply with independent inspections and audits.

Non-compliance with consent conditions or any other obligation under the legislation could result in an EEZ operator being issued with an **enforcement order**, requiring them to comply. Non-compliance may also trigger review and/or cancellation of their consent.

An EEZ operator who fails to comply with its consent or any of the rules and standards in the EEZ regulations may face scaled **penalties** of up to \$200,000 or \$10,000 a day for continuing offences and possible imprisonment. The penalties are consistent with the RMA.

Royalties, user charges and cost recovery

Most resources, especially non-renewable resources, are already subject to a royalty scheme under the Crown Minerals regime, and this will not change.

However, the Crown is considering levying a royalty on the extraction of any non-renewable, non-living resource in the EEZ not already covered by a royalty or similarly charged under the legislation. This may be clarified when the proposal becomes draft legislation.

The idea of imposing user charges for "occupying" space in the EEZ or the use of renewable resources in addition to royalties has been rejected. Such charges were seen by Cabinet as an inefficient method of managing the issues they aim to address. That is because space is not (yet) scarce, and the regime for using renewable resources in the EEZ is currently the same as that on land. For example, where users are not charged for wind.

As you would expect, the proposal also makes provision for cost recovery for administration services performed by the Ministry. These generally relate to the processing of consent applications, administration, monitoring and supervising consents, costs related to consent conditions, monitoring permitted activities and enforcement.

Structure and governance

The EEZ regime will be administered by a new unit of the Ministry for the Environment headed by an EEZ Commissioner. The Commissioner will be a statutory office. The Commissioner will be responsible for making recommendations to the Minister on decisions on applications for EEZ consents and the administration of the Act.

Administration will involve receiving consent applications, monitoring compliance and enforcement, collecting and managing access to information on the EEZ and promoting awareness of the legislation.

The regime also makes provision for the Maori Advisory Panel appointed and administered by the Commissioner. The Panel will be supported and funded by the Ministry to advise on various regulations. This includes development of the policy statement and regulations, advising on consent applications with significance for Maori and on the appropriate processes to seek iwi input and participation and any other relevant matters. The Panel will not be a substitute for the input of iwi into the development of policy and regulations, and in the consenting process.

Timeline and Opportunity to Comment

The Minister had initially proposed to report back to the Cabinet Legislation Committee by the end of July 2008, with the bill to be tabled at the end of August. Clearly, the impending national election and significance of other environmental legislation (such as emissions trading and waste minimisation) has hindered progress of this Bill in 2008.

Once the Bill passes its first reading, it will be referred to the Local Government and Environment Select Committee, where there will be an opportunity to make submissions on the Bill. We would be pleased to assist you with identifying issues well before then.

References

[Cabinet Paper: Proposal for Exclusive Economic Zone Environmental Effects Legislation - Cabinet decisions Cab Min \(08\) 23/7](#)

[Cabinet Paper: Proposal for Exclusive Economic Zone Environmental Effects Legislation Cab 07-C-0751](#)

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