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Dear Richard

Proposals for Cost Recovery: Emissions Rulings Service

Business New Zealand is pleased to have the opportunity to provide a submission to the Ministry for Economic Development on its consultation paper entitled 'Proposals for Cost Recovery: Emissions Rulings Service', dated December 2009.¹

Introductory Comments

Business New Zealand welcomes the release of the Ministry for Economic Development's consultation paper. With the passage of the Bill into law last December, and the commencement of legal obligations on participants on 1 January this year, it is timely to see the Ministry for Economic Development's view of who should pay for the cost of emissions rulings.

The Ministry for Economic Development reaches, without much effort, the conclusion that its costs should be recovered from the person seeking an emissions ruling. However, Business New Zealand does not believe that the case is so clear cut. Business New Zealand's has reservations relating to both the conclusions that all applicants should pay for the costs incurred, as well as the quality of the Ministry for Economic Development's analysis of the proposed fees *per se*.

This submission outlines the nature and extent of these reservations.

¹ Background information on Business New Zealand is attached in Appendix One.

Who Should Pay?

The discussion paper has, in Business New Zealand's view, failed to adequately justify the basis for charging applicants for rulings. The Ministry of Economic Development's consultation paper states that:

".....officials are confident that the benefit accruing to applicants is commensurate with the costs and risks....."²

Business New Zealand believes that such confidence is misplaced. This excerpt implies that a fee is charged so that the applicant, as the party that receives the most benefit from an exemption, pays the cost of the application process. However, in Business New Zealand's view, the discussion paper does not contain sufficient analysis leading to the proposal to charge the applicant, or why the 'beneficiary pays' approach is appropriate in this instance.

The Treasury's Guidelines for Setting Charges in the Public Sector (December 2002) ('the Treasury Guidelines'), recommend that a robust process be carried out to determine possible candidates to charge, and that 'beneficiary pays' is not necessarily efficient as a charging rule (see Guideline 4, page 12).

Are Emissions Rulings Public or Private Goods?

This question is germane to the issue of who should pay for the costs incurred and is addressed at some length in sections 3 and 4 of the Treasury Guidelines.

However, the issue does not appear to be explicitly addressed by the consultation paper. The presumption appears to be that all rulings sought will be paid for by the applicant and that as such, all rulings are private and not to be made public.

There are two instances in which this would not be the case. These are those cases in which:

1. an applicant considers that there is a general point on which clarification is warranted. Such an application would be aimed at enhancing the overall efficiency of the operation of the emissions trading scheme; and
2. what originated as a private ruling is found to have a more general application than the applicant's specific circumstances.

Such cases could generally give rise to what are known as 'public rulings'. This distinction between public and private rulings is consistent with the

² Ministry for Economic Development consultation paper entitled 'Discussion Paper Emissions Trading Scheme , Proposals for Cost Recovery: Emissions Rulings Service, dated December 2009, page 7

underlying ethos of the Act (based as it is on the approach to tax legislation of self monitoring and reporting, subject to audit) and the consultation paper refers to the provisions for tax rulings in its first paragraph. However, other than this reference, it is unclear whether any other consideration has been given to the actual approach taken by the Inland Revenue Department (the 'IRD'). Business New Zealand found the IRD document entitled 'Adjudication & Rulings, A Guide to Binding Rulings', dated October 1999 to be most informative.

This public/private ruling ambiguity needs to be clarified. Applicants should only be required to pay for the costs of the application where the ruling is unambiguously private (in other words only between the Ministry for Economic Development and the applicant and not used for any other purpose).

Business New Zealand notes that section 117 of the Act allows for the Chief Executive to publish certain aspects of emissions rulings for the purpose of providing general guidance (essentially 'public rulings'). This legislative authority neither implies anything concerning who should pay, nor suggests that analysis should not be undertaken to determine this.

In Business New Zealand's view, should section 117 be used, any costs associated with the application should be fairly apportioned and not simply all borne by the applicant. In this case, it could be strongly argued that all participants benefit from the development of clear rulings. This would be consistent with the application costs associated with staffing etc being recovered by the Ministry for Economic Development via its appropriation. To sheet the full costs of the application to the applicant in these circumstances is likely to result in a perverse incentive not to apply for rulings where it may be efficient overall for an application to be made.

It is possible that the fee schedule set out in the consultation paper is designed to only cover private rulings and merely needs better explanatory notes. However, this is unclear. All costs incurred on any other basis should not be borne by applicants.

Justifying the Proposed Fees

The proposed fee schedule is reproduced below.

Fee Schedule for Emissions Rulings	
Application filing fee (per application)	\$453.33
GST	\$56.67
Total	\$510.00
Hourly Rate (for considering and processing applications over 4 hours)	\$115.56
GST	14.44
Total	\$130.00
External costs and disbursements	Actual and reasonable costs fully recovered from applicant

Putting aside the question of public/private goods, Business New Zealand has some concerns regarding the analysis set out to justify the fees.

Although the discussion paper invites submissions on whether the proposed fees are appropriate, this consultation cannot be meaningful, nor judgement be made on whether the costs are in fact minor, when no detailed justification for the fees has been given. A cursory outline of what the fees will cover is set out on the bottom of page 8 of the consultation paper.

The A-G guidelines apply to all public entities that have statutory authority to charge a fee for the goods and services they provide. The A-G Guidelines recommend that, in setting fees, agencies carefully quantify the costs they need to recover.

Quantification should involve the identification of matters like the goods or services being produced, the volume of each good or service to be produced in a given period, and the volume and cost of resources required to produce them in that period (see paragraph 3.17). A key underpinning to the need for such rigor is to be able to demonstrate that reliance on what is a statutorily conferred right to recover costs has not been abused, or more likely, not been taken for granted.

This has not been provided. Indeed, in light of the following statement (made in the context of why a fixed application fee option is not preferred):

“Because of the difficulty in predicting the volume, complexity and when applications may be received, and therefore what fees will actually be paid.....”³

Business New Zealand wonders how the Ministry for Economic Development managed to come up with any figures at all.

As the Ministry for Economic Development well knows, while there are widespread instances of departmental costs being recovered from third parties, the initial expenditure must first be appropriated. Some logical basis must have been assumed when the appropriation was set (possibly in the 2009/10 Budget). Appropriations are generally not set (or, at a minimum, not supported by the Treasury) without being based on a reasonable set of assumptions. Business New Zealand can see no good reason why those assumptions have not been replicated for the benefit of submitters.

Accordingly, it is not even clear if additional staff will be required by the Ministry of Economic Development to administer the rulings service (as cost recovery should be set to short run *marginal* cost plus an element to recover fixed costs).

³ Op cit, page 9.

This gives rise to the risk of 'double-dipping': as the Ministry of Economic Development will understand, unless hired specifically for the purpose, staff costs will be 'sunk costs' and will automatically be covered by the Ministry of Economic Development's appropriation. Charging an additional fee for its staffing overheads on top of the costs covered by the appropriation would be tantamount to 'double-dipping'. Without any information about how the Ministry of Economic Development's appropriation will be affected by it having to administer the rulings service, it is not possible to be certain that the Ministry of Economic Development would not, if it also set fees, double-recover costs under both the appropriation and the proposed fees. It goes without saying that public agencies cannot double-recover the costs of their activities. For these reasons, external advice from Crown Law should be specifically excluded from being recovered from applicants as issuing another department legal advice on such matters is its core business for which it is already resourced.

A proper fee-setting process, and consultation, as required by the AG Guidelines would clarify this uncertainty. The absence of this detail from the discussion paper would indicate that the analysis recommended by the A-G guidelines has not been carried out (indeed we wonder about the extent to which the Ministry of Economic Development was aware of the A-G Guidelines).

The Treasury Guidelines similarly state that consultation is important for making charging policies acceptable to the public, and this should include giving the public ready access to the cost data (both actual and prospective) from which costs and charges have been formulated.

Other Comments

Business New Zealand has the following additional comments on the proposed fees:

1. there is a sense from the paper that its primary objective was to construct arguments for ensuring that taxpayers do not have to bear the cost, for example:

"This option would require the Crown to forego potentially significant amounts in recovery of direct costs."

and

"A fixed application fee option may not allocate scheme costs equitably across applicants, presenting an unacceptable risk of under recovery through fees and charges."⁴

Whether or not the Crown should bear any of the costs must be driven by robust analysis, and not by pursuit of an objective of avoiding the

⁴ Op cit, page 9.

Crown bearing any cost. This sense potentially taints the consultation with the risk of predetermination;

2. one of the stated objectives is that “applicants should have some certainty around the costs of obtaining an emissions ruling to allow them to make decisions on whether to make an application.”⁵ While only actual and reasonable costs are to be fully recovered from applicant, and the Chief Executive has the ability to waive, exempt or refund fees in some cases, Business New Zealand considers that applicants should be given more certainty than this. In particular, in addition to simply being provided with an estimate of third party costs, applicants should be actively involved in the preparation of any brief prepared by the Ministry of Economic Development and consulted in the choice of third party to be used; and
3. the fees have been calculated to recover the costs of providing the service over a three year period. Business New Zealand questions the validity of this assumption. All sectors (with the exception of on-farm emissions) will face an obligation to surrender units from 1 July 2010. This would imply a likely spike in applications over the next 12 months, declining to a ‘business-as-usual’ level.

What Next?

In light of these reservations, Business New Zealand considers that the Ministry for Economic Development should reconsider its conclusions and reconsult stakeholders on the proposed regulations. Business New Zealand recommends that no fees be set until, in accordance with the Auditor-General’s Guidelines on charging fees for public sector goods and services (the A-G Guidelines), and the Treasury Guidelines, there has been a proper analysis of the actual costs involved, and adequate consultation undertaken on that analysis.

Business New Zealand also considers that the Ministry for Economic Development should include draft regulations as a part of the reconsultation. This would aid in participant’s understanding of how the detail of the consultation paper is to be translated into the regulations, provide visibility of them before they are gazetted and improve the final quality of the regulations.

Finally, Business New Zealand recognises that the reconsultation process may delay the finalisation of the regulations (and hence the ability for the Ministry for Economic Development to recover any costs associated with applications). However, Business New Zealand considers that once the issue of who should pay has been settled, a strong argument exists for an initial fee stand-down period. Given the novelty of the economic mechanism being introduced, the ‘learning-by-doing’ that is likely to occur, and its uncertain effect, Business New Zealand recommends that the Ministry for Economic

⁵ Op cit, page 7.

Development consider an initial fee holiday, or grace period of at least 12 months. This could be implemented either by delaying the finalisation of the regulations, or (Business New Zealand's preferred method) gazetting the regulations with a commencement date of 12 months hence. The ability to waive fees is a policy matter, for the discretion of the Minister.

Summary

This consultation paper raises as many questions as provides answers. Given the statutory authority to charge fees, Business New Zealand considers that the Ministry of Economic Development faces a high burden of proof to assure stakeholders that the statutory right has not been taken for granted. Questions such as who should pay fees are fundamental to this.

As a result, there is insufficient information of which informed feedback on the proposed fees and its source can be made. This outcome suggests that at a minimum, the Ministry for Economic Development should reconsult with stakeholders in order to address the issues raised in this submission.

Business New Zealand is happy to discuss any aspect of this submission with the Ministry for Economic Development, should it wish.

Yours sincerely



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APPENDIX ONE: ABOUT BUSINESS NEW ZEALAND

Encompassing four regional business organisations (Employers' & Manufacturers' Association (Northern), Employers' & Manufacturers' Association (Central), Canterbury Employers' Chamber of Commerce, and the Otago-Southland Employers' Association), Business New Zealand is New Zealand's largest business advocacy body. Together with its 70-member Affiliated Industries Group (AIG), which comprises most of New Zealand's national industry associations, Business New Zealand is able to tap into the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.

In addition to advocacy on behalf of enterprise, Business New Zealand contributes to Governmental and tripartite working parties and international bodies including the ILO, the International Organisation of Employers and the Business and Industry Advisory Council to the OECD.

Business New Zealand's key goal is the implementation of policies that would see New Zealand retain a first world national income and regain a place in the top ten of the OECD (a high comparative OECD growth ranking is the most robust indicator of a country's ability to deliver quality health, education, superannuation and other social services). It is widely acknowledged that consistent, sustainable growth well in excess of 4% per capita per year would be required to achieve this goal in the medium term.