SUBMISSION

STRATERRA™
NATURAL RESOURCES OF NEW ZEALAND

Submission to Local Government and Environment Select Committee on

"HERITAGE NEW ZEALAND POUHERE TAONGA BILL (JUNE 2012)"

INTRODUCTION

1. Straterra Inc represents 90% by value of New Zealand minerals production, exploration, scientific research, service, and support[1].

2. On land, minerals activities are often carried out in areas where there is heritage/pouhere taonga, and it is common practice for exploration and mining companies to apply for authorities in relation to heritage. Therefore the Heritage New Zealand Pouhere Taonga Bill is of great interest to the minerals sector.

3. Straterra welcomes the opportunity to submit on the Bill. We do so from the perspective that resource management decisions in New Zealand must strive for an appropriate balance between economic, social and environmental objectives, and be based on sound information. As well, the New Zealand resource sector may legitimately expect to find clarity, transparency, and certainty, or, failing that, predictability in legislation and regulations. This is necessary for upholding the rule of law, and promoting New Zealand's attractiveness for investment.

4. In preparing this submission, Straterra has drawn on advice from our membership with direct experience with heritage legislation, in particular, Anderson Lloyd, Buddle Findlay, Newmont Waihi Gold, OceanaGold, and Solid Energy. This approach ensures to the maximum extent possible that Straterra submissions are robust, constructive, and are of value to the legislative process, for the New Zealand minerals sector, and society generally.

5. Straterra wishes to be heard by the Local Government and Environment Select Committee on our submission.

EXECUTIVE SUMMARY

6. This is generally a good Bill. Many of the proposed changes provide more clarity or improved processes, and these are supported. Straterra also takes this opportunity to raise issues of interest or concern, and makes related proposals for improvement.

[1] About Straterra www.straterra.co.nz/About+Straterra

7. Criteria for setting conditions on authorities should be developed for alignment with those applying under the RMA, and the Local Government Act 2002, to avoid excessive and unnecessary costs to applicants.

8. There should be no requirement to secure landowner consent in advance of applying for an authority to avoid unnecessary administrative delays – landowner consent would be needed in any event, and could be obtained at any time.

9. Heritage New Zealand Pouhere Taonga (Heritage NZ)[2] should be provided with clearer direction in the Bill in relation to policy statements, to uphold the principle of good public consultation.

10. The provision in the Historic Places Act 1993 (the Act) for a general authority covering multiple heritage sites in an area, whether known or as yet undiscovered, should be retained in the Bill, to avoid developers having to apply for an authority every time a new heritage site is discovered during works.

DISCUSSION

Introductory remarks

11. Initially, it was proposed to amend the existing legislation. However, the degree of amendment became such that the Government decided to introduce a Bill to replace the Act. That was a sensible decision. The relevant agency is the Ministry for Culture and Heritage[3].

12. Many of the proposed changes are supportable, because they provide more clarity or improved processes. That said, the Bill stops short of comprehensive alignment with the RMA, which we believe is a missed opportunity at regulatory reform.

13. For ease of reference, a full list of recommendations is appended.

The nature of mining and heritage

14. It is a fact that new minerals exploration and mining tend to occur where exploration and mining have been previously carried out.

15. The "old timers" were thorough in their search for opportunities in New Zealand, and won what they could from the ground, using the technology of the time. Today minerals activities are more

[2] Formerly the Historic Places Trust
[3] http://www.mch.govt.nz/what-we-do/our-projects/current/review-historic-places-act-1993

sophisticated, in finding resources, proving up economic viability, extracting ore, managing the effects on the environment, and engaging with communities, iwi and other stakeholders.

16. There is, therefore, an inextricable causal relationship between mining heritage, as defined in legislation, and mining today. Miners of the past modified the landscape and the environment, in search of minerals, and left significant physical evidence of their activities, largely because the industry was barely regulated, if at all, from today's perspective. Over time that modification has become "heritage" or "archaeological sites", while minerals remaining in the ground are still available for development. New explorers and miners arrive, wishing to continue the activities carried out in the past with modern methods, however, are faced with modifying heritage created by miners of the past.

17. If a narrow approach to heritage protection were to be taken, the implication is that the miners of the past, in damaging and otherwise disturbing the environment, would have by their actions prevented new mining activities, which are subject to much stricter environmental regulation, from taking place. To our knowledge, that outcome has not occurred to date, however, current and proposed legislation would not prevent it.

18. Straterra draws this matter to the attention of the Select Committee. We propose recognition in the Bill of the relationship between past and present minerals prospecting, exploration and mining.

Recommendation

a. Agree to *add to* **clause 4:** *"(e) the relationship between heritage sites and present-day activities, where a common use or development objective has been present over time*";

b. Agree to *add to* **clause 44 (5):** *"(c) the extent to which the objective of the proposed activity is related to the objective of the historic activity, and (d) the extent to which the proposed activity will enhance the understanding and interpretation of heritage values;"*

Collaboration principle

19. The Purpose and Principles remain the same in the Bill, noting an additional principle about interested parties working collaboratively (**clause 4(c)**). That is supported. It provides for

strategic consideration of heritage and economic activity in a district or region. This is particularly important for minerals exploration and mining, where, in many cases, new activities are proposed in areas of historic exploration and mining.

Recommendation

c. Note Straterra's *support* of clause 4 (c) on **working collaboratively** to protect New Zealand's heritage;

Definition of archaeological site

20. The definition of an archaeological site (**clause 6** of the Bill) now expressly includes *"*any building or structure (or part of a building or structure)" within the meaning of "any place". While noting this is a new development, it is possible that this is simply making explicit that which has always been implicit.

Definition of harm

21. The definition of harm (**clause 6**) refers in (b) to "damage to, or other modification of", and in (c) to "alteration", which appears to be redundant. As an aside, "modification" could include action to prevent further deterioration of an archaeological site, which would be a counter-intuitive example of "harm".

Recommendation

d. Agree to *delete* **item (c) of the definition of "harm"** in clause 6, because it is a redundant definition;

Treaty of Waitangi

22. In line with modern drafting practice, the Treaty of Waitangi clause (**clause 7**) provides acceptable clarity in how the Bill gives effect to the Crown's obligations under the Treaty.

Recommendation

e. Note Straterra's support of clause 7 on Treaty of Waitangi matters;

Institutions

23. More clarity is provided on the functions and powers of Heritage NZ, and the Māori Heritage Council, in Part 2 of the Bill (**clauses 9 – 13** and **clauses 17 - 36**), to resolve tensions in the relationship between the two bodies, which is supported.

Procedures for amending policy statements

24. Straterra supports **clause 15,** which provides procedures for adopting policy statements, including a public submission process. But **clause 15 (6)** states: "Heritage New Zealand Pouhere Taonga may amend a statement *in the manner and by any process that it thinks fit*" (Straterra's italics). That provision could undermine the public process used to create the original policy statement, and is, therefore, inappropriate.

Recommendation

f. Agree to amend clause 15 (6) to read: "Heritage New Zealand Pouhere Taonga may amend a statement *using the same process as required for the adoption of a statement*";

General Authority

25. Sections 12 and 14(2) of the Act provide for a "general authority" to, e.g., damage "all archaeological sites within a specified area of land" or for "any class of archaeological site within a specified area of land". A general authority can only be granted if HPT is "satisfied on reasonable grounds that there is no particular benefit to justify the likely cost of locating and identifying (a) every individual site present within the specified area of land; or (b) every individual site of the class to which the application relates that is present within that area".

26. This is very useful because a general authority will list known sites in an area, and then include "any other" site, applying the same conditions, enabling work to continue in an area, instead of having to wait for a new authority to be processed for every individual case of a heritage site, including new ones that are found during work.

27. The lack of a general authority provision in **clause 42** will result in more paper work for an applicant, frustrating the "streamlining" intent of the Bill. It also is impractical when an applicant is undertaking works at a site that because of its size or character may contain archaeological sites not readily apparent or easily identifiable until excavation starts.

Recommendations

g. Agree to *provide* for a **general authority** in clause 42 (1) by inserting: "*(aa) an application for an authority to undertake an activity that will or may harm a class of, or all archaeological sites within a specified area of land*";

h. Agree to *add* to the **definition of authority** in clause 6: "authority means an authority granted by Heritage New Zealand Pouhere Taonga under **section 46** to undertake an activity that will or may harm an archaeological site *or class of archaeological sites or all archaeological sites within a specified area of land";*

Minor applications

28. **Clause 42 (1) (b)** provides for applications for authorities where the harm to a site will be no more than minor. A "minor" application does not require a detailed assessment of effects under **clause 43 (2) (g)**. That is supported.

Recommendation

i. Note Straterra's support for retaining a "minor" category of application in clause 42;

Approval of person

29. The Bill (**clause 42 (3) (e)** and **clause 45**) requires approval of the person "who…is to carry out an activity in relation to any authority granted". While the Act currently requires the same evaluation, only in respect of a person engaged to undertake an investigation for the holder of an authority, the Bill would require an applicant to show, on application, that it has "sufficient skill and competency" to carry out the activity and has "appropriate access to institutional and professional support and resources". Perhaps, applicants are required to demonstrate these things under the current Act, even though this is not a specific requirement. It would be helpful for the Act to define a person to include businesses, for clarity.

Recommendation

j. Agree to *define* the term "**person**" in clause 6 the Bill, along the lines of the definition used in section 2 of the RMA: "includes the Crown, a corporation sole, and also a body of persons, whether corporate or unincorporate";

Streamlining of information requirements under the RMA with the Bill

30. Straterra supports the streamlined information requirements with the RMA. Information previously provided under the RMA for a resource consent application or a notice of requirement for a designation can be provided to Heritage NZ as part of the authority application requirements (**clause 43 (4)**).

31. That said, where both a resource consent and an authority are required, the relevant council will require Heritage NZ's affected-person approval for the non-notified processing of the resource consent (section 95B of the RMA). Logically, an applicant should be able to lodge applications for the authority and resource consent at the same time. The streamlined information provision could be amended to reflect this scenario by removing the word "previously".

32. To enable our proposal, it should be made explicit that HNZPT can provide to the RMA process affected-party approval prior to a related decision by HNZPT on an application for an authority. That could be done in a way that does not limit HNZPT's discretion when considering an authority application.

Recommendations

k. Agree to amend **clause 43 (4)** to read: "An applicant who *also requires* a resource consent or designation under the Resource Management Act 1991 (the **planning application**) *for the activity or associated activity – (*a) may provide the same information to Heritage New Zealand Pouhere Taonga that is provided for the planning application under the Resource Management Act 1991; but (b) must ensure that all the information required by **subsection (2)** is also provided";

l. Agree to amend **clause 12** to specifically provide for RMA affected party approval prior to a decision on a related authority, along the lines of inserting: "*(aa) Give affected party approval under the Resource Management Act 1991 for activities that require or have been granted an authority";*

Landowner consent

33. The Act and the Bill (**clause 43 (2) (b)**) both require proof of landowner consent with an application for an authority. While this requirement is not new, it has troubled some applicants in the past. We propose the removal of this requirement, on the basis that RMA cases have confirmed that the RMA consent process is not concerned with issues of land tenure, and, if

someone gets a consent, but does not have the landowner's approval to enter the land, that is the consent holder's problem. We endorse that approach, as essential for streamlining the operation of the Bill.

34. Note that a landowner's interests are further protected by their right to appeal under **clause 56**, in addition to their right to withhold consent to land (a right which could be clarified in the Bill).

Recommendations

m. Agree to *strike out* clause 43 (2) (b) on the **requirement for landowner consent** when applications for an authority are made, as unnecessary, and for consistency with the RMA;

n. Agree to *amend* clause 49 on **imposition of conditions on authorities** to include a new (1) (aa): "*if the applicant is not the owner of the land work must not start until the applicant has provided Heritage New Zealand Pouhere Taonga with proof of the owner's consent to the proposed activity*";

o. Agree to *amend* clause 52 on the **commencement and duration of authorities** by inserting a new sub-clause (3) (c) to say: "2 years from the date the authority commences, if landowner consent has not been obtained;

p. Agree to *add to* clause 53 on "**Effect of grant of authority** … " a new subclause (3): *"An authority does not alter requirements for access arrangements between the authority holder and land owner";*

Veto powers

35. Both the Act and the Bill (**clause 43 (3)**) give Māori the ability to veto an application to investigate a "site of interest to Māori" (defined in **clause 6**) using methods that will "harm" (destroy, damage, modify, alter) it. While the power of veto is extreme, it is a continuation of the status quo, and does not appear to have been exercised with any frequency to date.

Statutory time frames for processes

36. The Bill introduces new and helpful processing timeframes: **clause 44** sets out statutory timeframes for the processing of applications for authorities; **clause 48** sets out statutory

timeframes within which applications for archaeological authorities are to be determined; and **clause 60** sets out statutory timeframes for the review of conditions of archaeological authorities.

37. The inclusion of timeframes consistent with the RMA is supported. That said, it will be important to ensure that the elevated role of the Māori Heritage Council, for applications of interest to Māori, does not extend the timeframes established in **clause 48**.

Recommendation

q. Note Straterra's support of the introduction of statutory timeframes consistent with the RMA;

Unlimited conditions

38. **Clause 46** states an authority can be granted "subject to any conditions it sees fit". This is a very wide discretion, and should be more specific. The conditions should be proportional to the importance of the site, and take into account any predicted deterioration if the site was left alone.

39. At issue is that the costs of meeting conditions of authorities can be significant, and exceed that required under the RMA for the same matters. In that light, it may be helpful if "heritage"' conditions in relation to the RMA and this legislation were considered only once. It is noted that section 108 of the RMA (on conditions of consents) provides for a financial contribution in only some circumstances, and the Local Government Act 2002 (section 200) does not allow development contributions where a financial contribution has already been imposed. Perhaps, the costs issue under this legislation could be addressed in the same or a similar way.

40. On a positive note, this provision can provide for draft consent conditions for an applicant to consider to resolve matters in a way that avoids a lengthy and costly appeal process.

Recommendation

r. Agree to amend **clause 46** to include matters for Heritage NZ to have regard to when imposing conditions along the lines of: "(1) In determining an application made under **section 42**, Heritage New Zealand Pouhere Taonga may – (a) grant an authority, in whole or in part, subject to conditions *made under* ***subsection (3)*** and including conditions that may be imposed under **section 49**… " and *"(3) When imposing conditions Heritage New Zealand Pouhere Taonga must have regard to: (a) the significance of the site; (b) likely degradation to the site if no authority is granted; (c) the cost to the applicant of implementing conditions; (d) the existing information relevant to the site and usefulness of additional information."*

Referral of applications to the Māori Heritage Council

41. The Bill requires all applications for authorities to be referred to the Māori Heritage Council where they relate to a "site of interest to Māori" (**clause 47 (1) (a)**). In contrast, the Act requires applications for "general authorities" to be referred in the same circumstances (section 14 (3)). The reason for the change is not clear – perhaps, it relates to **clause 42 (1) (a)** and our concerns with that clause. At this stage, we assume the change will make little difference in practice.

Expiry of authority vs lapsing

42. The Act specifies lapsing dates similar to the RMA (section 14 (10)). The Bill does not propose to include lapsing dates, however, proposes expiry dates instead (of five years unless specified otherwise) in **clauses 53 (3) and (4)**. The default expiry date is commensurate to the default date under the RMA. Applicants will need to be aware of the change, and expressly consider how long they want the authority to last.

Ability for the Authority to check for the need for approval

43. The Bill and Act both provide Heritage NZ with the ability to enter land and check for the need for approvals if work is being carried out that is reasonably suspected to need an authority (**clause 55** of the Bill, and section 13 of the Act). While there is a slight change in wording between the two sections, the substantial test remains the same – whether work being undertaken is likely to harm an archaeological site. It is noted the Bill uses the term "locality"; however, its meaning has not been defined, and, perhaps, should be.

Recommendation

s. Agree to *define* the meaning of **"locality"** in clause 6 of the Bill;

Determination and registration of wāhi tapu

44. Part 4 of the Bill (**clauses 63 – 81**) contains details for the registration by HNZPT of wāhi tapu and wāhi tapu areas (among other things), and for the involvement of the Māori Heritage Council in that registration. Records must be supplied to the territorial authority of all registered wāhi tapu and wāhi tapu areas within the area of a territorial authority. Strateerra supports this transparent and consultative process for identifying, registering, and communicating wāhi tapu and wāhi tapu areas.

45. We argue that the burden of proof for determining wāhi tapu should be placed on those advocating for wāhi tapu, not private applicants for consents, because it is less onerous to prove a positive (there is a wāhi tapu at this site), than prove a negative (there is no wāhi tapu at that site). The processes provided seem reasonable in that context.

Recommendation

t. Note Straterra's support of Part 4 of the Bill on registration of sites;

Interaction between the Bill and RMA planning processes

46. Heritage protection is provided for in district plans under the RMA, i.e., heritage that is not an archaeological site continues to be regulated by district councils (while informed by Heritage NZ). The provision for protection under this draft legislation is continued. **Clause 75** provides for local authorities to have regard to recommendations by Heritage NZ, meaning that the way heritage sites are protected is ultimately determined by local authorities. That is a realistic solution.

Recommendation

u. Note Straterra's support for **clause 75**, which provide for heritage to be recognised in RMA

FULL LIST OF RECOMMENDATIONS

a) Note Straterra's *support* of clause 4 (e) on **purpose and principles**;

b) Note Straterra's support of clause 7 on Treaty of Waitangi matters;

c) Agree to amend clause 15 (6) to read: "Heritage New Zealand Pouhere Taonga may amend a statement *using the same process as required for the adoption of a statement*."

d) Agree to *provide* for a **general authority** in clause 42 (1) by inserting: *"(aa) an application for an authority to undertake an activity that will or may harm a class of, or all archaeological sites within a specified area of land*".

e) Agree to *add* to the **definition of authority** in clause 6: "authority means an authority granted by Heritage New Zealand Pouhere Taonga under **section 46** to undertake an activity that will or may harm an archaeological site *or class of archaeological sites or all archaeological sites within a specified area of land."*

f) Note Straterra's support for retaining a "minor" category of application in clause 42;

g) Agree to *define* the term "**person**" in the Bill, along the lines of the definition used in section 2 of the RMA: "includes the Crown, a corporation sole, and also a body of persons, whether corporate or unincorporate";

h) Agree to amend **clause 43 (4)** to read: "An applicant who *also requires* a resource consent or designation under the Resource Management Act 1991 (the **planning application**) *for the activity or associated activity* – *(*a) may provide the same information to Heritage New Zealand Pouhere Taonga that is provided for the planning application under the Resource Management Act 1991; but (b) must ensure that all the information required by **subsection (2)** is also provided".

i) Agree to amend **clause 12** to specifically provide for RMA affected party approval prior to a decision on a related authority, along the lines of inserting: *"(aa) Give affected party approval under the Resource Management Act 1991 for activities that require or have been granted an authority."*

j) Agree to *strike out* clause 43 (2) (b) on the **requirement for landowner consent** when applications for an authority are made, as unnecessary, and for consistency with the RMA;

k) Agree to *amend* clause 49 on "**Imposition of conditions on authorities**" to include a new (1) (aa): "*if the applicant is not the owner of the land work must not start until the applicant has provided Heritage New Zealand Pouhere Taonga with proof of the owner's consent to the proposed activity*".

l) Agree to *add to* clause 53 on "**Effect of grant of authority** … " a new subclause (3): *"An authority does not alter requirements for access arrangements between the authority holder and land owner."*

m) Note Straterra's support of the introduction of statutory timeframes consistent with the RMA;

n) Agree to amend **clause 46** to include matters for Heritage NZ to have regard to when imposing conditions along the lines of: "(1) In determining an application made under **section 42**, Heritage New Zealand Pouhere Taonga may – (a) grant an authority, in whole or in part, subject to conditions *made under* ***subsection (3)*** and including conditions that may be imposed under **section 49**… " and *"(3) When imposing conditions Heritage New Zealand Pouhere Taonga must have regard to: (a) the significance of the site; (b) likely degradation to the site if no authority is granted; (c) the cost to the applicant of implementing conditions; (d) the existing information relevant to the site and usefulness of additional information."*

o) Agree to *define* the meaning of "**locality**" in clause 6 of the Bill;

p) Note Straterra's support of Part 4 of the Bill on registration of sites;

q) Note Straterra's support for **clause 75**, which provide for heritage to be recognised in RMA plans.