

# Submission

To the

## Maori Affairs Select Committee

On

“Marine And Coastal Area (Takutai Moana) Bill”

### Introduction

1. Straterra Inc was formed in 2008 to be a collective voice for the New Zealand resource sector. Its membership includes gold producers (all NZ hard rock production), coal producers (>90% of NZ production), affiliation with aggregates, as well as exploration, research, service and support. Members’ exports exceed \$1.5 billion a year, and incur more than \$30 million a year in exploration spending.
2. The resource sector makes a significant contribution to the New Zealand economy. Oil, gas, coal, gold, aggregates and other minerals contributed \$2.149 billion to GDP in 2008, compared to the wine industry (\$0.454 billion), and tourism (\$6.660 billion). Resource exports in 2009 earned \$3.6 billion (8.2% of total goods exports) while dairy in that year was \$10 billion, and overseas tourism, \$9.3 billion. In 2009 there were 6800 people employed directly in mining, and 8000 people, indirectly, flowing from the economic activity of the 6800. The median wage for a mining employee was \$57,320 in 2008, compared to the New Zealand median of \$33,530.
3. Properly encouraged, the resource sector’s contribution to the New Zealand economy could grow significantly. As a resource-rich country, and with new technologies and changing demands, New Zealand’s mineral and energy resources will afford economic opportunities for many decades to come. This is particularly the case in the marine and coastal area, where there is demonstrated potential for petroleum and ironsands.
4. This Bill aims to protect the legitimate interests of all New Zealanders, with particular emphasis on Maori. Therefore, businesses operating in the marine and coastal area may legitimately expect to have their existing-use rights protected. These businesses, and businesses with an interest in investing in the marine and coastal area, may also legitimately expect to find clarity in the new legislation and to find certainty of process and in the rules to be followed, or in the absence of that, certainty in being able to discover them. This is necessary for upholding the rule of law and promoting New Zealand’s attractiveness for investment.

5. Straterra welcomes the opportunity to submit to the Select Committee on the Bill. We do so, both to acknowledge the efforts made to provide for the interests of the resource sector (and businesses and New Zealand generally), and to propose improvements to the Bill.
6. Straterra has considered the Bill from the perspective of interests in prospecting for, exploration of, and mining of resources in the marine and coastal area.
7. Straterra wishes to be heard on its submission.

### **Executive summary**

8. The aims of the Bill are supported by Straterra, in particular, the protection of existing-use rights and of the legitimate interests of businesses.
9. That said, the Bill is unlikely to achieve its aims as currently drafted, giving rise to serious concern within the resource sector. A large number of inconsistencies, ambiguities, anomalies and gaps in the detail of the Bill create uncertainty for businesses, inadequate protection of the interests of existing businesses, and poor incentives for investment.
10. Of paramount concern are the inadequate legislative provisions made for a business that holds a prospecting or exploration permit, or has applied for the same, before the effective date (of entry into force of the new legislation), and wishes to upgrade to exploration and mining permits. It is conceivable the business could acquire the permit upgrade but is unable to exercise it because an iwi group exercises its right of veto of a resource consent application, or because wahi tapu are recognised in the area of interest, or a planning document is written that leads to a ban on mining in regional plans.
11. Many concerns relate to apparent clerical errors in the drafting of the Bill. It is unclear whether access arrangements will be available for holders of prospecting, exploration and mining permits (privileges). Owners of structures could face trespass orders or new charges for occupying the common marine and coastal area. Businesses may be unable to access the marine and coastal area. They could be closed down by the Minister of Conservation, even if operating lawfully. There is inconsistent or incomplete treatment of permits, licences, leases and approvals.
12. There is an issue of political and democratic process to consider. The proposal to award ownership of non-statutory minerals to customary marine title groups is a fundamental change to the Crown minerals regime. While the public process being led by the Ministry of Economic Development to review the Crown Minerals Act allows for the possibility of this Bill having an influence, the issue of minerals ownership was declared out of scope. It is, therefore, inappropriate for the Crown to modify the minerals ownership framework in a way that is contrary to its terms of reference for the Crown Minerals Act review.

13. The process for recognition of customary marine title by agreement is fraught. Business may find it difficult to identify relevant iwi claimant groups for consultation in resource consent processes. There is no process for dealing with any competing claims. The process fails to recognise that businesses may already have commercial and other relationships with iwi groups.
14. Uncertainty is a cost to business. It can make it difficult to raise, manage and retain investment capital. Naturally, there is always some uncertainty to any commercial enterprise, and good business invariably correlates with good risk management. In that light, businesses naturally strive to eliminate unnecessary uncertainty, and it is in this spirit this submission has been prepared.
15. Straterra proposes amendments to key clauses, to eliminate or reduce the potential for perverse outcomes.

#### **Recommendations on key clauses of the Bill**

16. Straterra's recommendations are phrased as proposals for amendments, deletions or additions to the Bill (expressed in italics), followed by a brief rationale for proposed changes. In some cases, we make general observations about a clause for the Crown's consideration, without necessarily proposing a solution. Further explanation on some clauses is provided in additional notes (paragraphs 50-67).

#### Clause 4: Purpose of the Bill

17. Retain the purpose of the Bill, in particular, the wording relating to "protection of the legitimate interests of New Zealanders" (clause 4 (1) (a)), and "recognises and protects the exercise of existing lawful rights and uses" (clause 4 (2) (d)). This is important for providing certainty to businesses, and promoting New Zealand's attractiveness for investment, in the marine and coastal area.
18. The underlying question to this submission is whether or not the Bill - clause by clause, or as a whole - meets the Bill's purpose, and strikes the right balance between potentially competing sets of interests.

#### Clause 7: Interpretation

19. Define the terms "permit", "licence", "lease" and "approval". This would avoid confusion between "permit" and "privilege", a term applying to prospecting, exploration and mining permits under the Crown Minerals Act 1991 and analogous permissions under previous legislation. This would also remove any inconsistencies in the Bill, arising from the appearance of "lease" and "licence" in clause 22, and of "approval" in clause 64.

20. Define the term “access arrangement”, e.g. in terms of section 2 (1) of the Crown Minerals Act, as part of clarifying that access arrangements will be available for the exercise of privileges.

Clause 8: Meaning of accommodated activity

21. Provide an addition to clause 8 (1) to clarify that accommodated activities are also relevant in the context of protected customary rights, i.e. for consistency with clause 57:

**8 Meaning of accommodated activity**

(1) In this Act, **accommodated activity** means any of the following, to the extent that they are within a customary marine title area, *or are within an area in which a protected customary right is recognised*:

Clause 9: Meaning of deemed accommodated activity (refer also to paragraphs 50-54)

22. Delete clause 9 (1) (c) and amend clause 9 (1) (b) by deleting the words “for petroleum”.

- (b) any activity
  - (i) that, at any time after the commencement of **Part 3**, is necessary for, or reasonably related to, prospecting, exploration, mining operations, or mining (as those terms are defined in section 2 of the Crown Minerals Act 1991) under a privilege; and
  - (ii) for which an agreement or an arbitral award has been made under **Part 2** of **Schedule 1**; or

23. This would avoid the situation in which the holder of an exploration permit for ironsands, within an area that becomes held in customary marine title, applies for and obtains a mining permit, and then applies for a resource consent to exercise the mining permit only to find that the application fails to succeed under clause 57 or clause 65. That would amount to inadequate protection of existing-use rights.

Clause 17: Continued Crown ownership of minerals (paragraphs 55-56)

24. Amend clause 17 (3) to avoid the possibility of existing-use rights, including rights to subsequent privileges and being able to exercise those privileges, being trumped by other clauses of the Bill.

**17 Continued Crown ownership of minerals**

(3) **Section 11, section 77, section 78 and section 84** do not affect any privileges, *or the exercise of privileges in any respect*.

25. Note that privileges may be provided for in legislation other than the Crown Minerals Act. Deleting the reference to the CMA, as above, would address that issue.

26. Add a sub-clause 17 (3A) to clarify that access arrangements will be required with the Crown in respect of Crown-owned minerals:

(3A) *to avoid doubt, section 17 (3) is subject to a requirement for access arrangements as provided for under section 54 of the Crown Minerals Act 1991.*

27. Even though no one will own the common marine and coastal area, a company should still be required to apply for access to the resource for prospecting, exploration and mining, in order for conditions to be placed on access, where appropriate, and to protect that right of access for the holders of privileges.

28. Incorporate the inter-connection between clauses 82 and 83 into clause 17.

(4) This section is subject to **section 82 and section 83**

#### Clause 19: Rights of owners of structures

29. Additions to clause 19 are required to avoid owners of structures being subject to trespass orders in the common marine and coastal area, or facing new or additional charges for the occupation of space. Leaving this clause unchanged would fail to protect the legitimate interests of owners of structures.

#### Clause 22: Certain proprietary interests to continue

30. The wording “nothing in this Act limits or affects” should be brought into clause 22 by adding a sub-clause 22 (8), for consistency with clause 21:

(8) *Nothing in this Act limits or affects the exercise of the proprietary interests specified in **section 22 (1)***

31. To elaborate, the wording in clause 22 (7) “this section overrides section 11” raises the question as to which clauses of the Bill are not overridden. The uncertainty created is reinforced by the strong wording of clause 21, “nothing in this Act limits or affects”, wording not used anywhere else in the Bill. The inference is that other clauses are weaker in their effect than clause 21. It is reasonable to ask, therefore, whether clause 77 and clause 84 could trump clause 22, and to propose an amendment to avoid this occurring.

#### Clause 27: Rights of access (paragraph 57)

32. Specify that rights of access to the common marine and coastal area should apply to “persons” to include businesses as well as individuals, to enable businesses to access their operations in the common coastal and marine area, and clarify that no one may charge for access to any part of this area:

#### **27 Rights of access**

(1) Every *person* has the right of freedom of ô

33. Straterra supports clause 27 (2), which provides for regulations (clause 119) and bylaws (clause 120) to restrict public access, e.g. to oil and gas rigs, and installations for ironsands exploration and extraction. In granting a resource consent to a business, a council could also enact a bylaw to provide the necessary safeguards for health and safety. Such matters could also be addressed in connection with access arrangements (clause 17).

Clause 30: Minister of Conservation (paragraph 58)

34. Add a sub-clause 30 (7) to avoid the possibility of the Minister of Conservation or delegate closing down a business if it “prejudices the preservation of natural features” or “substantially detracts from the peaceful enjoyment by members of the public”:

*(7) Nothing in this section limits the ability for a person to exercise resource consents, privileges, permits, leases, licences or approvals.*

Clause 53: Meaning of protected customary rights

35. Provide examples in clause 53 of activities eligible to be considered as protected customary rights, to reduce uncertainty for businesses and investments. The mention of launching waka and collecting hangi stones in the preamble to the Bill should be repeated in clause 53. It would be helpful if the Crown provided further specific examples. Would gathering of seashells, driftwood or seaweed; lighting of fires to cook food; harvesting of titi (muttonbirds); or activities in relation to stranded whales qualify? Straterra proposes the matter should be clarified as far as reasonably practicable because of clause 57 which specifies how protected customary rights can affect resource consents. If businesses do not know what protected customary rights are, or what form they could take, it may be difficult for them to assess investment opportunities and manage risk in the marine and coastal area.

Clause 57: Effect of protected customary rights on resource consent applications

36. Clause 57 (3) (c) (ii) provides a necessary exemption for deemed accommodated activities (clause 9).

#### Clause 64: Customary marine title rights

37. Amend clause 64 (4) to provide adequately for existing-use rights in relation to privileges that are otherwise only partially protected under clause 83, and to continue to provide incentives for investment, and reduce uncertainty for businesses:

- (4) The functions of a customary marine title group to give or decline permission under a RMA permission right or conservation permission right do not apply to
  - (a) activities for which *a privilege*, a resource consent, a permit, or an approval, as the case may be, has been obtained before the effective date *or before the date of settling of a claim for customary marine title*, whether or not the *privilege*, consent, permit, or approval has been given effect to or exercised before *those dates*; or
  - (b) applications made before the effective date *or before the date of settling of a claim for customary marine title* for a relevant *privilege*, resource consent or conservation activity, whether or not the application is finally determined before that date;

#### Clause 65: Scope of RMA permission right

38. Clause 65 (6) is necessary in light of Straterra's proposed amendment to clause 9 (1) (b) and deletion of clause 9 (1) (c).

#### Clauses 77 and 78: Protection of wahi tapu (paragraphs 59-62)

39. Clarify where wahi tapu areas can be positioned, on application by customary marine title groups, to reduce uncertainty for businesses and investment.

##### **78 Wāhi tapu conditions**

- (1) The wahi tapu conditions that must be set out in a customary marine title order or an agreement are
  - (a) the location of the boundaries of the wahi tapu or wahi tapu area that is the subject of the order, *which must fall within the boundaries of the relevant customary marine title area*; and

40. Harmonise clauses 77 and 78 with sections 25 and 32 of the Historic Places Act 1993 to provide consistency between provisions for recognition and protection of wahi tapu on land and in the marine and coastal area, to provide clarity and reduce uncertainty for businesses and investments.

#### Clause 82: Status of minerals in customary marine title area

41. Consider deleting clause 82, which, if enacted, would introduce a fundamental departure from the Crown minerals regime. Section 11 (1) of the Crown Minerals Act 1991 provides for the Crown to retain ownership of all minerals on land alienated from the Crown, and that would include the foreshore and seabed on repeal of the Foreshore And Seabed Act 2004 and enactment of this Bill.

42. The issue is that the Crown Minerals Act is already under review, via a public process being led by the Ministry of Economic Development. A discussion document was released for public consultation on 27 August 2010. While this document admitted the possibility of this Bill influencing the Crown minerals regime, the issue of Crown ownership of minerals was declared to be out of scope. On that basis, it would be inappropriate for the Crown to introduce fundamental changes to the Crown minerals regime in a way that is contrary to the Crown's terms of reference for the review of the CMA.

Clause 83: Status of existing privileges within the common marine and coastal area

43. Notwithstanding Straterra's views on clause 82, clarify the situations relating to applications for privileges lodged but not granted before the effective date, or lodged but not granted before the date of settling of a claim for customary marine title, to protect existing-use rights and avoid uncertainty for businesses and investments, and to provide consistency with Straterra's proposed amendments to clause 9, 17, and 64 (4).

- (1) Despite **section 82(2) and (3)**, the following privileges, rights, obligations, functions, and powers continue, to the end of their term, as if **section 82** had not been enacted:
  - (a) privileges in existence immediately before the effective date *or before the date of settling of a claim for customary marine title*;
  - (aa) *privileges applied for but not approved before the effective date or before the date of settling of a claim for customary marine title*;

Clause 84: Planning document (paragraphs 63-67)

44. To clarify rights of public access, rights of navigation, the powers of the Minister of Conservation, and to protect the legitimate interests of businesses, the following additions to clause 84 are proposed.

- (5) *A planning document cannot override **section 17, section 27, section 28, section 30, section 57, section 64, section 65, section 83, section 119 or section 120***
- (6) *Nothing in a planning document can apply to an accommodated activity*

Clauses 93-95: Recognition by agreement

45. Reconsider the process for recognising customary marine title by agreement, alternatively, delete clauses 93-95, while retaining the court process provided for in clauses 96 ff. As currently drafted, this process is fraught, for the following reasons.

46. There is no process for publicly notifying who the applicant groups are and over what area they are claiming customary marine title. This is a significant omission because of clause 64 (3) in which businesses wishing to apply for resource consents will need to consult first with claimant groups. How will they do that if they don't know who the applicant groups are?

47. Nor is there a process for addressing the possibility of competing claims to a particular area. Even if a business applying for a resource consent, as above, were to identify a claimant group for consultation, there is no guarantee that this group is the appropriate or the only claimant group, or that this group will meet with success in its claim. The ability for businesses to reach commercial arrangements with Maori could be greatly frustrated by the uncertainties these clauses introduce.
48. The process also fails to consider that businesses may already have developed commercial and other relationships with iwi around the country, a potential source of information for the Government when it considers applications for recognition by agreement.
49. There is the broader Constitutional issue of whether it is appropriate for the Government rather than the Crown to be reaching agreements behind closed doors with claimant groups. This process is outside of the processes for reaching settlements of Treaty of Waitangi claims.

#### **Additional notes on key clauses of the Bill**

##### Clause 9: Meaning of deemed accommodated activity

50. The Crown minerals regime provides for the right for the holders of a prospecting permit to convert that into an exploration permit, and that into a mining permit, subject to due diligence. This is provided for in clause 17 and clause 83 and that is appropriate. The concern is that there is an inadequate connection between these clauses and the clauses relating to resource consents.
51. From a resource sector perspective, existing-use rights should apply to any business that has acquired or has applied for a prospecting or exploration permit before the effective date. A business applying for an exploration permit or mining permit after the effective date should still be regarded as a deemed accommodated activity.
52. For example, an ironsands business may invest significant capital in prospecting and exploration and in applying for and obtaining a mining permit, only to find that an application for a resource consent to exercise the mining permit could fail to succeed under clause 65. This would add to uncertainty for that business, making it difficult to raise, manage and retain investment capital. The ability of such businesses to continue to operate in New Zealand could be severely jeopardised because clause 9 (1) (c), as worded, fails to provide for this scenario.
53. Petroleum interests are adequately protected under clause 9 (1) (b), at least in respect of resource consent applications. Straterra assumes this may relate to the Crown's ownership of petroleum wherever it occurs and the difference in treatment of petroleum from other minerals under the Crown Minerals Act. Regardless, it is a poor reason for drawing a distinction between

activities in relation to petroleum and other minerals, because of the existing-use rights issues raised, and because of the potential national or regional significance of mineral resources in the common marine and coastal area.

54. It is noted that minerals interests and the “interests” of customary marine title groups are provided for appropriately under the arbitration provisions for negotiating an “activity agreement” under Schedule 1 of the Bill.

#### Clause 17: Continued Crown ownership of minerals

55. In stating that “section 11 does not affect any privileges”, the question is raised whether other clauses of the Bill can affect clause 17, for example, the right of holders of protected customary rights to establish wahi tapu (clauses 77 and 78), and to write planning documents (clauses 84, 86, 87 and 91) and clauses affecting resource consents (clauses 57 and 65). The matter should be clarified to avoid doubt. It is conceivable that a customary marine title group could write a planning document that prevented new investments in oil or ironsands exploration and mining within a customary marine title area.
56. Clause 17 (4) states that the Crown’s ownership of minerals in the common marine and coastal area is subject to clause 82, which specifies that customary marine title groups own the non-statutory minerals within customary marine title areas. However, the rights of holders of existing privileges are protected in clause 83, as if clause 82 had not been enacted. This qualification on the applicability of clause 82 should be reflected in clause 17 to ensure consistency within the Bill.

#### Clause 27: Rights of access

57. Straterra believes clause 27 is ambiguous on the question of whether or not holders of customary marine title could charge for access, in the case of individuals or persons. Consider section 4 (2) (e) of the National Parks Act 1980 which provides that “the public shall have *freedom* of entry and access to the parks” (Straterra’s italics), subject to conditions to do with conservation management. This wording makes it absolutely clear that the Crown cannot charge for access to national parks. Straterra proposes the same approach be taken in this Bill, noting the Government’s stated intention in this respect, rather than draw on section 7 of the Foreshore and Seabed Act 2004.

#### Clause 30: Minister of Conservation

58. Clauses 30 (3) (b) and (c) provide for the Minister of Conservation or a delegate to close down a business if, in their opinion, it “prejudices the preservation of natural features” or “substantially detracts from the peaceful enjoyment by members of the public”. It is unclear how these clauses

interact with clause 21 which says that “nothing in this Act limits or affects any resource consent”. Perhaps, there has been a clerical error. Clause 30 (3) would apply logically to individuals rather than persons. This interpretation is supported by clause 30 (5) stipulating a fine of no more than \$5000, and clause 30 (8) providing for a constable to arrest a person without warrant. Both would apply more logically to an individual than a person.

#### Clauses 77 and 78: Protection of wahi tapu

59. It is unclear over what area a wahi tapu area could apply from the wording of clause 78 (1) (a). Logically, a wahi tapu area would be recognised within an area held in customary marine title but this is not clear from the wording of clauses 77 or 78. The Crown’s intent should be clarified.
60. Clause 77 and 78 of this Bill provide no criteria for determining wahi tapu when assessing proposals for recognising and protecting wahi tapu. Coupled with the uncertainty created in this Bill over the location of wahi tapu, the resource sector is faced with considerable uncertainty indeed. When assessing opportunities for investment, businesses will have no way of knowing what form wahi tapu could take and have no assurance from the Crown that any attempt will be made to determine that when considering applications for recognising and protecting wahi tapu in the marine and coastal area. This will make it more difficult for businesses to raise, manage and retain investment capital. It would increase New Zealand’s sovereign risk, as a place for doing business.
61. Section 2 of the Historic Places Act 1993 defines wahi tapu to mean “a place sacred to Maori in the traditional, spiritual, religious, ritual, or mythological sense”, which is the definition adopted in this Bill. This is a very broad definition, which is adequate in the HPT Act context because its interpretation is assisted by sections 25 and 32 of that Act. Section 25 requires an applicant for registration of wahi tapu to “specify the general location and *nature* of the wahi tapu” (Straterra’s italics). Section 32 requires a registration proposal for a wahi tapu to be supported by “sufficient evidence”. In this Bill, there are no such requirements. Instead, clause 77 (2) (a) requires only “evidence to establish the connection of the [customary marine title] group with the wāhi tapu”.
62. Straterra believes as a matter of general legislative principle there ought to be no difference between the treatment of wahi tapu on land and in the marine and coastal area, in terms of identifying wahi tapu and having them registered. Straterra proposes that clauses 77 and 78 of this Bill should be harmonised with sections 25 and 32 of the HPT Act to provide consistency.

#### Clause 84: Planning document

63. Clause 84 provides for a customary marine title group to write a resource management plan that could either enable prospecting, exploration and development or prohibit it. The group can do

this without consulting anyone, and the relevant regional council may decide to give effect to the planning document in their plan, with little or no consultation with the public, under clause 91. This could affect minerals interests.

64. For example, a business may have invested millions of dollars in prospecting and exploration, in an area that comes under customary marine title, believing their interests to be safeguarded under other clauses of this Bill, only to find that mining becomes banned in that area. This consideration will make it very difficult for businesses to raise, manage and retain investment capital, and will increase the sovereign risk of doing business in New Zealand. Clause 84 alone could turn businesses away from New Zealand.
65. It is accepted that customary marine title groups should have the right to create a planning document along the lines of iwi development plans on land under the RMA. However, the rights of the holders of existing privileges, resource consents, permits, licences, leases and approvals; and of applications lodged before the effective date for the same, ought to be respected, for consistency with the purpose of the Bill as set out in clause 4 (2) (d).
66. Clause 21 provides that “nothing in this Act limits or affects” existing resource consents, which would include clause 84. However, the same consideration is not extended to other forms of existing-use right, or other rights. Straterra proposed an amendment to clause 17 (3) to deal with this issue for privileges (prospecting, exploration and mining permits), and proposed adding to clause 22, a sub-clause (8) to deal with this issue for existing permits, leases and licences. This leaves unresolved the status of applicants for the foregoing, whether an area is held in customary marine title or is under claim for customary marine title. The status of public access, rights of navigation, and the powers of the Minister of Conservation are also unresolved.
67. In principle, any owner of private land can write a plan for managing that land, and has a great deal of control of what can or cannot happen on that land. The exception is petroleum where there is provision for arbitration over access to land under section 55 of the Crown Minerals Act. For other minerals, in theory, an Order in Council could be sought for arbitration, based on the applicant meeting a criterion of national significance (section 54 (2) (b) of the CMA). Clause 84 could override these provisions. The amendment proposed by Straterra for clause 17 (3) would allow the status quo ante to continue.

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