

# **Submission**

By

**Straterra**

To the

**Ministry of Justice**

On

**Reviewing the Foreshore and Seabed  
Act 2004**

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## ***Introduction***

The Government has highlighted the priority it is placing on the development of New Zealand's resource endowment, through the Schedule 4 Discussion Document, and by way of statements made by the Minister of Energy and Resources, and others.

This submission responds to the consultation document entitled 'Reviewing the Foreshore and Seabed Act 2004' (the **Consultation Document**) and focuses on the impact that the Foreshore and Seabed Act Review may have on the development of New Zealand's mineral resources in the foreshore and seabed zone. We consider that the review of the Foreshore and Seabed Act 2004 represents an important opportunity to clarify the legal rights associated with the mineral deposits on and under the foreshore and seabed. Central to this is the opportunity to confirm a legislative and regulatory regime that does not discourage investment in the assessment and development of NZ's mineral resource, and is internationally competitive in terms of attracting investment to NZ.

## ***Straterra***

Straterra was formed in 2008 to represent stakeholders in the Natural Resource sector and ensure the mineral wealth of New Zealand is accessible. It is important that we balance the environmental and other concerns associated with mineral exploitation with the economic potential that these Natural Resources offer. [Note: Are we able to provide an indication of who these stakeholders are? This may add weight to the submission.]

The Mission statement of 'Prosperity through Partnership' captures the essence of what Straterra wants to achieve. Only through partnership we can create a united voice for the mineral industry and build strong relationships with the communities in which we work and the wider population of New Zealand.

## ***Mineral Potential***

A number of Prospecting Permits and Mining Permits have been granted, and applications for such permits made, covering areas of ironsand resources on the West Coast of the North Island. Ironsand is currently mined and processed for export from Taharoa, and from Waikato North Head for feedstock for the Glenbrook Steel Plant South of Auckland. Prospecting permits for ironsand are held by a number of companies over other areas of the North Island West coast.

There are various estimates of the potential value of these ironsand resources. Barker estimates an in ground value of \$26b and other estimates range from \$60b to over \$100b at current values.

There is also interest from firms in alluvial gold that has been carried offshore by rivers on the West Coast of the South Island.

### ***Assurances and Principles***

The seven principles on which any new legislation will be based, as set out in the Consultation Document, are all very important. However, from a mineral perspective, the most crucial of these is **certainty**.

It is reasonable to expect that new resource sector investment will come from the private sector, and most of that investment will be international. Like oil and gas, mineral sector investment is relatively high risk, particularly in the early stages of assessment, because mining development generally requires high capital and long lead times.

If New Zealand is to attract this type of investment, business needs to understand and have confidence in the minerals regulatory regime. This requires, at a minimum:

- (a) a clear legal process by which an investor obtains permission to undertake prospecting, exploration and mining activities;
- (b) early identification of the parties with whom an investor must interact and, if required, from whom an investor must obtain consent in order to undertake prospecting, exploration and mining activities;
- (c) a high degree of certainty that, if a mineral prospect is identified, the investor will be permitted to (eventually) mine that prospect; and
- (d) relative certainty regarding the potential costs that will likely be incurred in mining an identified resource.

Currently, the process that must be followed to obtain permission to undertake prospecting, exploration and mining activities is relatively clear. Although the process differs slightly depending on the mineral that is to be exploited, the key elements of the existing general process in relation to Crown Minerals can be summarised as follows:

- (a) An investor will require a permit from the Ministry of Economic Development (prospecting, exploration or mining permit).
- (b) In order to exercise the rights granted under a permit on private land, landowner consent is required (subject to certain exceptions). If a landowner does not consent, an arbitration process is followed to determine how land access can be provided to the investor.

- (c) Royalty payments are usually required to be paid to the Crown, as part of the conditions of the permit. In addition, investors will often agree to royalty payments (or other types of payments) to the owner of the land on which activities are undertaken.

The key aspects of the current process, that provide certainty for an investor, include the following:

- (a) *Certainty of Process* . Investors know and understand the process that they need to follow in order to be permitted to (eventually) exploit a new resource.
- (b) *Certainty of Priority* . Investors know that there is a degree of certainty that investments in prospecting and exploration (which are high cost and inherently risky) will lead to permission to mine a discovered resource (often referred to as the ~~subsequent~~ subsequent right+regime).
- (c) *Certainty of Parties* – Investors know who they need to engage with in order to be permitted to (eventually) exploit a new resource. If a resource is located under dry land, the position is relatively straightforward (most land falling within the Torrens System with readily identifiable owners). Until now, if a resource is located on or under the foreshore and seabed, the position has also been straightforward (prior to the 2004 Act the Crown presumed ownership of that land and the 2004 Act confirmed that presumption).
- (d) *Certainty of Payments* . Investors know that they will likely need to pay royalties to the Crown and also make other payments (including royalties) to the landowner. There is also relative certainty about the level of those payments, which enables investors to weigh up the costs of exploiting a particular resource and the potential returns of doing so. This, in turn, enables an investor to decide whether or not the exploitation of a particular resource is economically viable.

We consider below whether each of these certainty requirements is met by the Crown proposals set out in the Consultation Document.

### **Certainty of Process**

The Consultation Document does not set out a proposed process for exploiting non-Crown owned minerals in the foreshore and seabed. The review of the 2004 Act presents an opportunity to do so (or confirm the existing process will continue to apply). We consider that any such process should provide certainty of priority, parties and payments, as set out above.

## **Certainty of Priority**

One of the key assurances made in the document is ~~the~~ Protection of existing use rights to the end of their term. For the mining industry, this has a particular meaning and importance.

Generally the process of developing a mining project has a number of stages that may be carried out by the same entity, but often involves different parties at each stage. Firstly, there is the prospector who obtains a prospecting permit and who uses their special skills to look for new areas of mineralization. If a discovery is made, then a mining permit is required in order to extract the associated resource.

Currently there is in place a ~~subsequent right~~ regime so the prospector's investment is ~~secure~~. This is essential if the prospector is to be able to build a business case to attract investment, and is therefore essential to attract investment in the first instance. This is a well established and intuitively obvious process.

It is not clear from the Consultation Document whether this ~~subsequent right~~ can be guaranteed under the proposed new regime. This is such a fundamental issue for the industry that it needs to be explicitly laid out in any legislation or change because, without this certainty, there will likely be no investment in mineral exploitation in the foreshore and seabed.

## **Certainty of Parties**

The Consultation Document is largely silent about the treatment of any minerals identified under/on the foreshore and seabed. This is fundamental to any changes that are being considered. Under the current proposals it is unclear as to who the minerals industry would need to deal with to get access to any resources identified in the foreshore and seabed.

The issue of who to deal with in relation to the exploitation of minerals on or under the foreshore or seabed arises in a number of contexts.

### *No "owner" of "public domain"*

If no-one owns the foreshore and seabed, who will investors need to talk to in order to obtain permission to undertake activities within the foreshore and seabed? Any uncertainty in this context will severely impede investment.

### *Identifying Māori interests*

The Consultation Document infers that it may take some time to determine whether Māori have territorial or non-territorial customary rights in the foreshore and seabed and, if so, who represents the Māori customary rights holders. Any uncertainty about who has rights to the foreshore and seabed in the interim will stifle investment.

It is important that, until Māori interests are determined, ~~someone~~ has authority to deal with investors as representative of the ~~public domain~~. That ~~someone~~ would need authority to enter into arrangements with investors which cannot be ~~reopened~~ once Māori interests are determined. This will provide investors with the long-term certainty they require to invest (which, as stated above, often involves significant financial outlay on a relatively high risk basis).

### *Dealing with Māori interests*

Access is a difficult problem for the minerals industry. Unlike the petroleum sector, there are no mechanisms by which an impasse with the landowner can be resolved. If access arrangements had to be negotiated with multi-owner iwi or hapu groups, this may make the process of gaining land access very difficult. Those difficulties could arise for a number of reasons, including the following:

- (a) There may be some uncertainty as to which Māori group has interests in a particular area. It is possible for more than one Māori group to express an interest in an area, which could lead to contested claims between Māori groups. This could potentially extend to contested claims between hapu of the same iwi. That creates uncertainty for an investor, as it is unclear who an investor should deal with until that issue is resolved.
- (b) More than one entity may claim to represent one particular Māori group. Again, until these ~~mandate~~ issues are resolved, an investor will be unsure as to who it should engage with.

### **Certainty of Payments**

Investing in the exploration and mining of minerals requires complex assessments of the economic viability of a potential resource. Fundamental to this assessment is the calculation of payments by an investor to allow the investor to undertake the required activities. Those payments are often (but not always) in the form of royalties.

Currently, an investor will know that, if the resource is proven, it will need to pay royalties to the Crown. It will also likely be required to make payments (usually in the form of royalties) to landowners from whose land the resource is extracted. Currently there is a reasonable degree of certainty as to the level of payments required to be made by investors by way of royalties or other landowner payments.

The industry considers it paramount that certainty in royalty and other landowner payments be maintained. To do otherwise increases the risk that investors will

overlook New Zealand in preference to other economies where the costs of resource extraction are more certain.

Importantly, the industry is indifferent as to *who* any payments (whether by way of royalties or otherwise) are to be paid. The key area of certainty required by investors is the required level of those payments and the certainty that that level will not change unexpectedly during the course of a mineral exploration and extraction project.

### ***The Governments Proposals***

The concept of nobody owning the foreshore and seabed actually introduces a new type of law into our statute book. This is a bold move and something not very common here or overseas. This introduces some doubt into the minds of investors and particularly their legal advisors due to this unfamiliar approach. It can only be a disincentive for investment.

Currently the Crown, as owner, is able to charge royalties for minerals recovered from the foreshore and seabed. If control of the resource passes from Government control to Māori through a proven territorial interest, presumably any landowner negotiations will take place with those Māori. While most companies with an interest in this area have developed close links to local iwi, this is not always the case. This may take some time for new players to New Zealand who are unfamiliar with the local situation.

### ***Industry support for option 2***

Of the four options laid out the minerals industry would prefer Option 2. This provides the most familiarity and certainty for potential investors.

Dealing with the Crown for access to minerals is common around the world and has a long history in New Zealand. This give investors confidence before making large, risky financial decisions. If we are to maximise the utilisation of our Natural Resources we need to make things as easy and clear as possible.

For this reason we would prefer the foreshore and seabed to be held in absolute Government title.

### ***Determining Customary interests***

Straterra believes that the fairest process would be that iwi/hapu groups go to the courts to claim recognition of their customary interests. This allows the courts to build up experience and jurisprudence around the issue and for a consistent approach that will add to the certainty or at least minimise uncertainty.

In terms of which Court, we would be more comfortable with the High Court hearing submissions as this is the higher Court. There may be a perception that the Māori Land Court is more favorable towards Māori interests.

We believe that it should be the responsibility of the claimants to prove their case as in the normal course of events. It is unclear why the taxpayer should pay any of these costs.

The issues of tests and awards is central to this debate. These are important questions to all New Zealanders and it is essential that there is adequate time to consult and have their views taken into account. This can happen during the passage of legislation. Therefore we suggest that it would be possible to have the tests set out in legislation.

However the awards are a different matter, as these are likely to be much more diverse and will depend on each individual situation. For this reason the awards must be decided by the courts on the basis of the legislative tests and the courts' experience as it grows in this area.

### ***Territorial and non-territorial tests***

We note that the Government's current proposals represent a significant relaxation of the tests that were brought into effect in 2004. This goes to the question of how much area will be covered by these interests. Until we have some notion of this, it is impossible for us to say yes or no to the current proposed tests. If significant amounts of the foreshore and seabed are covered, particularly by territorial interests given the very wide powers this is likely to confer, some strengthening of the tests may be required.

We note that parts of the proposed tests involve concepts from Māori law and which are outside of the mainstream of our English based legal system. While this may not be a problem there could be a perception that these tests are likely to be easier for iwi and hapu groups to satisfy as they have more familiarity in this area and the jurisprudence may not be so well formed.

### ***Awards for non-territorial interests***

The Crown is proposing a combination of protection of certain customary rights such as fishing or collecting hangi stones and input into the environmental management of the area involved and areas that have an influence on the activity.

Again it is hard for us to make a definitive decision on this as so much is unknown. It seems reasonable that customary rights such as fishing should be protected in some way but this type of activity is likely to be adversely affected by

any mining type operations at least in the initial stages and possibly for the life of the operation in the area. If large scale mining could be precluded through this process then the industry could not support such protection. There would need to be a process by which the parties could enter into negotiation and some arbitration process if negotiation failed.

We do not believe that these activities should attract a lower level of RMA attention and do not support proposal that these activities should be exempt from sections 9 . 17 of the RMA. They should be subject to the same rule of law as any other New Zealanders. Public scrutiny of any proposals is the only fair way forward.

In terms of the input into environmental management, again it does not seem unreasonable for iwi and hapu groups to have some input over the area through a planning document. However this risks making a very difficult and onerous process even more so. The question must be asked if the hapu or iwi groups will have the level of expertise or resources required to enter into this process.

The placement of Rahui is accepted as long as there is some control over where it can be placed and for how long, particularly those areas in the sea.

There needs to be some assurance that no environmental degradation occurs through these awards. It seems unlikely in that if the activity has been going on since 1840 then it must be sustainable. However the dynamics of the situation may change leading to the possibility of exploitation and long term environmental damage. This must not be allowed to happen and the controls proposed in the Consultation Document seem particularly weak in this area.

### ***Awards for proven territorial interests (Customary Title)***

We now get to the area where Straterra perhaps has the strongest objections. The rights being proposed are absolute property rights in any practical sense. Presumably that means ownership and control of all minerals in the area.

Access is a difficult problem for the Minerals industry. Unlike the petroleum sector we have no mechanisms by which an impasse with the owner can be sorted out. Although in theory there are mechanisms in the Crown Minerals Act for disputes resolution, in practice these are often impossible to resolve. If access arrangements had to be negotiated with multi-owner iwi or hapu groups this may make the process impossible.

The most difficult proposal is the power of veto over all activity in the area with no power of appeal. This has the ability to lock up a significant national resource that will benefit all New Zealanders indefinitely. This seems far too strong an award and goes against natural justice where decisions can be appealed to the courts. Given the value of the resources in question this does not seem right.

We would reiterate our comments on Environmental protection from the previous section.

### ***Other Issues***

Another issue to be considered is related to the question of how much of the foreshore and seabed is likely to be subject to non-territorial or territorial interests. The Consultation Document states that the test requiring exclusive occupation since 1840 is a high one. This implies that there are not likely to be many of these areas. However there is a situation where it is possible that there could be many of these areas and they could be extensive. This is the scenario where Treaty claimants make a case that they would have held areas since 1840 exclusively if they had not been forcibly evicted from these areas by Crown breaches of the Treaty of Waitangi. There needs to be some contemplation of this possibility and how it might affect the process of awarding territorial interests.

A further issue of interest relates to free access. Much has been made of this point by both Government and Maori in the lead up to this debate. However access infers liability for the land owner in terms of health and safety and possibly other things. It is important that this issue is discussed to ensure open access to all and that this right will not be gradually whittled away over time.

Finally we need to consider the legal status of the wider offshore environment. With the creation of our Exclusive Economic Zone (EEZ) the situation has changed markedly. Many of the statutes that currently govern this area, including the current Foreshore and Seabed Act 2004, talk about the 12 mile limit. This is now practically a thing of the past and the current legislation needs to be changed. This would be a great opportunity to look at all legislation in this area and make sure it is coordinated and makes the most of the new opportunities presented by the EEZ. With regard to this particular legislation we are concerned that the 12 mile limit could extend to the 200 mile limit over time and could impact on all activities in that area.