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Committee Secretariat
Local Government and Environment Committee
Parliament Buildings
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Dear Committee Members

**Heritage New Zealand Pouhere Taonga Bill**

*Introduction*

1. The Legislation Advisory Committee ("LAC") was established to provide advice to the Government on good legislative practice, legislative proposals, and public law issues. It produces and updates guidelines for legislation, known as the Guidelines on the Process and Content of Legislation. These have been adopted by Cabinet.

2. The terms of reference of the LAC include scrutinising and submitting on aspects of Bills that raise public law issues or issues of inconsistency with the Guidelines, and helping improve the quality of law-making and the clarity of legislation.

3. The LAC makes no comment on the policy underpinning the Heritage New Zealand Pouhere Taonga Bill. This submission instead addresses a range of technical or operational matters which affect the clarity of the proposed legislation or its application. Some of these pose a potential inconsistency with the LAC guidelines or raise substantive issues. Others are more minor issues of workability of the legislation or relationships with existing law. The LAC does not wish to be heard in support of this submission.

4. This submission relates to the following issues, presented below in numerical order by clause:

- Advocacy role and resource consent hearings – clause 11(1)(b) and 12(1)9a)
- Power of Entry – clause 13(1)
- Amendment of policy statements – clause 15(6)
- Consistency with policy statements – clause 15(7) and 16(3)
- Majority decision making – clause 17 and 32(8)
- Donee status of HNZPT – clause 22
- Remuneration and reimbursement – clause 36
- Definition of "owner" and "registered interest"- clause 37
- Owner consent requirement – clause 43(b)
- Land restoration – clause 49(1)(a)
- Informing HNZPT of a change in ownership – clause 53
- Powers where no authority is held for an activity – clause 55
- Right of appeal - clause 56
- Emergency authorities – clause 58(1)
- Standing for submissions and oral submissions – clause 67
- Notification to iwi – clause 71
- Mens rea requirement for offences – clause 83 and 84
- Definition of "investigation" – clause 87(1)(b)
- Bylaw powers – clause 89
- Injunctions to prevent offences – clause 90
- Penalties – stay of resource consent – clause 91(2)
- Public bodies authorised to make contributions – clause 95
- Transitional provisions – clause 101 and 102

*Context*

5. We have had some discussions with officials on this Bill, and some of the points we have raised have been addressed in the Supplementary Order Paper dated 16 October 2012. Others are still under consideration, but we consider it appropriate to raise them in this submission so that the Committee can address them if it wishes.

*Advocacy role – clause 11(1)(b) and 12(1)(a)*

6. Clause 11(1)(b) states that one of the functions of Heritage New Zealand Pouhere Taonga ("HNZPT") is "to advocate the conservation and protection of historic places, historic areas, wahi tapu, and wahi tapu areas". Clause 12(1)(a) provides that HNZPT has the powers necessary to "advocate its interests at any public forum or in any statutory planning process".

7. Under section 95A of the Resource Management Act 1991 ("RMA"), applications for resource consents will be publically notified if the consent authority determines that the activity will have or is likely to have more than minor adverse effects on the environment. If an application is not publically notified, the consent authority must give limited notification under section 95B to those affected by the activity, and only those notified will be able to submit. If HNZPT is not notified of a resource consent application, it will not

be able to fulfil its statutory advocacy role in respect of that application, despite the broad powers given in clause 12(1)(a). To improve the alignment with the RMA and enable HNZPT to meet its statutory functions, it could be clarified that HNZPT is to be notified of any resource consent application in respect of a place included in the Record.

*Power of Entry – clause 13(1)*

8. Clause 13(1) grants powers of entry to any employee of HNZPT or person authorised by HNZPT for the purpose of carrying out an investigation of an archaeological site; or obtaining information as to the significance of an archaeological site; or locating, recording, or inspecting any historic place. Clause 13(4) provides that the powers conferred include a power to "locate, record, or inspect any historic place and to do everything reasonably necessary for the exercise of that power, including affixing any pegs, marks, or poles."

9. These powers of entry could be more closely aligned with those under the Public Works Act 1981. For example, sections 110 and 111 of the Public Works Act authorise entry with "vehicles, appliances, machinery, and equipment as are reasonably necessary". For the powers of entry under clause 13 of the Bill to be effective, attendant powers similar to those in the Public Works Act 1981 may be required.

10. It is also unclear whether 13(4) is intended to authorise taking samples. If this is the intention, it would be desirable to have a specific power as in the Public Works Act.

*Amendment of policy statements – clause 15(6)*

11. Clause 15(6) allows HNZPT to amend a policy statement "in the manner and by any process that it thinks fit". This contrasts with the process for the initial development of a policy statement, which requires public consultation. It would be preferable to have a similar process for amendment, rather than allowing HNZPT to choose an ad-hoc process and dispense with consultation.

*Consistency with policy statements – clause 15(7) and 16(3)*

Clause 15(7) and 16(3) prohibit HNZPT from acting inconsistently with a policy statement or conservation plan. This creates two issues. First, it may lead to unduly vague policy statements and conservation plans so that HNZPT avoids breaching the requirement. Second, if HNZPT does breach a policy statement or conservation plan, the action will arguably be ultra vires. It may be appropriate to allow HNZPT to breach a policy statement or conservation plan in some circumstances, for example on the unanimous resolution of the board. This may be necessary in unforeseen circumstances, such as responding to natural disasters. This could follow the approach of the Local Government Act 2002 which contains provisions in sections 96, 80 and 97 to allow a local authority to act inconsistently with its long term plan in certain circumstances. Attention is drawn to Clause 8, Schedule 8 LGA

2002 which states that a failure to comply with a Statement of Intent does not affect validity. A similar provision seems appropriate here.

*Majority decision making – clause 17 and 32(8)*

12. Clause 17 provides that "a resolution signed or assented to in writing by members who together form a quorum is as valid and effectual as if it had been passed at a meeting of the board validly called and constituted." Clause 32(8) applies a similar approach to decisions by the Maori Heritage Council, providing that if a resolution is signed or assented to by a quorum it has the same effect as a majority decision. There is a risk that these provisions might allow the majority of the Board of HNZPT and the Maori Heritage Council to avoid proper decision making processes. At a minimum, a resolution should not be valid unless all members have received the materials and have been provided with the opportunity to take part in the decision.

*Donee status of HNZPT – clause 22*

13. Clause 22 provides that HNZPT is exempt from income tax. It may also be useful to provide that the HNZPT has charitable status for donations. The Historic Places Trust ("HPT") is a donee organisation and it would be inefficient for HNZPT to have to register again under the new name and structure.

*Remuneration and reimbursement – clause 36*

14. Clause 36 provides for the remuneration and reimbursement of members of the Maori Heritage Council. It may be preferable to apply section 48 of the Crown Entities Act to both the Maori Heritage Council and the Board of HNZPT.

*Definition of "owner" and "registered interest"- clause 37*

15. Clause 37 provides that HNZPT may enter into a heritage covenant with the owner or with the lessee or licensee of an historic place or historic area or wahi tapu or wahi tapu area.

16. This clause includes the following definitions:

> (6) In this section,—
>
> ...
>
> **owner**, in relation to land,—
>
> (a) means the owner of the fee simple estate in the land; and
>
> (b) includes—
>
> (i) any lessee or licensee who derives title from the land (other than a lessee or licensee who is executing a covenant); and

(ii) any person with a mortgagee's interest in the land

**parties** means Heritage New Zealand Pouhere Taonga and includes, as relevant,—

(a) the owner, lessee, or licensee of the historic place, historic area, wahi tapu, or wahi tapu area; and

(b) the owner of the land to which the historic place, historic area, wahi tapu, or wahi tapu area relates.

17. The term "owner" is not defined for the purposes of the rest of the Bill. It is appropriate that the consent of a mortgagee is required before a heritage covenant is entered into, as these covenants may have implications for the value of the property. To give effect to this, clause 37(3) should refer to "every" owner. It would also be sensible for the Bill to require the consent of other parties with registered interests, whose interests might also be affected by the covenant. For example a heritage covenant that restricts earthworks in order to protect an archaeological site might have implications for the holder of an easement allowing water or power to be conveyed underground.

18. Clause 6 defines "registered interest" as follows:

**registered interest—**

(a) means an estate or interest in land registered under the Land Transfer Act 1952; and

(b) includes a mortgage or charge registered under that Act

19. These provisions could be aligned to provide that those with a registered interest must consent to a heritage covenant over land.

*Owner consent requirement – clause 43(b)*

20. Under clause 43, an application for an authority requires the consent of the owner if the owner is not the applicant. This could create an issue for applications in the common marine area, where there is no owner. There is also an issue for Crown land administered by the Department of Conservation. This arises under the current provisions in section 11 of the Historic Places Act 1993. Instances have occurred where the Department of Conservation ("DoC") will not consent to the activity until the application is granted, but the HPT will not grant the application without land owner consent.

21. It is also questionable whether it is appropriate to require owner consent before an application is granted. For example, the landowner may have different views to the applicant about the appropriate conditions to be imposed. Under the RMA, owner consent is not required as part of a resource consent application. Resource consents do not grant the right of land access; this must be negotiated separately with the land owner. This process

allows the land owner to separately present their views in submissions or a resource consent hearing. A similar process may be appropriate for authorisations.

22. We are aware of concerns about the power of some agencies, especially those administering public land to agree to the causing of "harm" because of the mandate under which they operate. The most obvious is DoC and others administering the conservation estate, since section 6 of the Conservation Act has a heavy emphasis on preservation and avoidance of damage; yet "harm" (although widely defined) carries clear connotations of doing damage of some kind. There may well be a case for an empowering provision so that irrespective of any constraints in their mandates, public bodies can, but cannot be compelled to, agree to harm if it is in the wider public interest

23. Clause 43 also requires that the legal description of land be provided. A description should be sufficient for land which has no legal description, such as land within a National Park or land in the common marine area.

*Land restoration – clause 49(1)(a)*

24. Clause 49(1)(a) provides that it will be a condition of all authorities that the "site must be returned as nearly as possible to its former state (unless otherwise agreed with the owner of the land on which the site is located)". It is unclear whether the agreement referred to is that between the landowner and the applicant, or the landowner and HNZPT.

*Informing HNZPT of a change in ownership – clause 53*

25. Clause 53 provides that if an authority is granted it runs with the land and is not affected by change of ownership. The new owner, lessee, or licensee must, however, give notice to HNZPT of the change of ownership. We consider that the onus should be on the initial owner to inform the new owner of the existence of the authorisation and inform HNZPT of the change in ownership. There is a risk in imposing this obligation on the new owner, as the new owner may not be aware of the authorisation.

*Powers where no authority is held for an activity – clause 55*

26. Clause 55(1)(a) allows HNZPT to undertake certain actions if activities are being carried out without an authority. We consider that this should extend to activities that are about to be carried out as well as those which are already being carried out.

27. Under clause 55(3), if exploratory investigations establish that the site is an archaeological site and will be harmed by an unauthorised activity, HNZPT "must ensure" that the activity "ceases immediately". It is unclear how HNZPT is expected to comply with this obligation, or the ramifications if the activity continues despite HNZPT's best efforts.

*Right of appeal - clause 56*

28. Clause 56 provides a right of appeal to any person directly affected by a decision of HNZPT under a range of clauses in that Part. However, not all the clauses listed grant specific decision making powers. It is therefore unclear precisely what may be appealed. It also is questionable whether an appeal is the appropriate form of review for a decision to exercise a power, such as the power of entry under clause 55. If some form of review is needed for the exercise of a discretion, it may be more appropriate to have a separate objections process.

29. The way this clause is currently drafted, there is a risk of appeals under clause 56 to the Environment Court against actions taken by HNZPT under clause 55(3) in higher courts.

*Emergency authorities – clause 58(1)*

30. Clause 58(1) states that the purpose of the subpart is to provide a process for obtaining an emergency authority if there is a national or local emergency that causes or is likely to cause "loss of life or serious injury to persons" or "serious damage to property". The subpart only applies if a national or local emergency has been declared under the Civil Defence Emergency Management Act 2002. We suggest that the declaration of a national or local emergency sets the bar sufficiently high, and the provisions in clause 58(1)(a) and 58(1)(b) are unnecessary and could reduce the effectiveness of the subpart.

31. A separate issue is the way applications are determined once accepted for consideration. Clause 60(2)(a) provides that HNZPT must take into account the purpose of the subpart. If it is intended that public safety be taken into account, this should be made explicit. The current provisions do not provide direction as to the appropriate course of action if the activity would cause serious damage to heritage values but is justified by a cautious approach to public safety.

32. Clause 59(4) allows HNZPT to decline to consider an application for an emergency authority. Clause 60 allows HNZPT to refuse to grant an emergency authority. We consider that reasons should be required if HNZPT declines to consider, or refuses to grant, an emergency authority.

*Standing for submissions and oral submissions – clause 67*

33. Clause 67(1) and 72(1) contain a list of persons with standing to make written submissions on an application for registration.

34. A general concern is that public notice is given of the application, but only specified persons are able to submit. There is also a risk that the list may be under-inclusive. One solution would be to allow anyone to make a submission on the same basis as under s 274 of the RMA, that is, a person should be able to submit if the person has an interest greater than the interest of the general public.

35. The Bill does not provide for oral submissions. However, given the potential effect on property rights there might be merit in allowing owners, occupiers, or those with registered interests to make oral submissions. Clause 67 and 72 could be amended to provide for this.

*Notification to iwi and submissions by iwi – clause 71 and 67*

36. Clause 71 requires notification of an application for registration to the "appropriate iwi". This is problematic, as there may be more than one iwi with an interest in the area, or a hapu may the more appropriate level for notification. The same wording is used in the list of persons able to submit under clause 67. In both clauses, a less restrictive wording may be preferable, such as "any iwi or hapu that has an historical association with the area."

*Mens rea requirement for offences – clause 83 and 84*

37. Clauses 83 imposes an offence if a person breaches a heritage covenant "knowing or having reasonable cause to suspect" that the site is protected. Clause 84 imposes an offence for harming an archaeological site while "knowing or having reasonable cause to suspect" that the site is an archaeological site.

38. We consider that these clauses should all be revised to provide a standard of "knows or reasonably ought to know" that the site is protected or is an archaeological site, as the case may be. This would be an objective rather than a subjective test. It would not require the prosecution to prove that the offender actually had grounds for suspicion, but rather that the circumstances were such that they should have known. For example, a landowner ought to know whether there is a covenant registered against their land even though it may be difficult to prove actual knowledge or grounds for suspicion. We note that the same point could be made with respect to clause 88, however, this issue does not arise if the clause is deleted as indicated by the Supplementary Order Paper.

*Definition of "investigation" – clause 87(1)(b)*

39. Clause 87(1)(b) imposes an offence of carrying out an investigation without the permission of HNZPT. There is no definition of "investigation" in this clause and it is unclear whether it is intended to include only exploratory and scientific investigations as defined in the interpretation section, or whether it is referring to investigations as ordinarily understood. If it is the latter, this would appear to criminalise the merely curious.

40. It is also unclear in principle why this offence is necessary, given that any investigation which harms the site will be captured separately in the offences under clause 84.

*Bylaw powers – clause 89*

41. Clause 89 carries through a number of offences from section 104 of the Historic Places Act. The following offences are included:

- intentionally and without authority entering land vested in or under the control of HNZPT, except in accordance with a bylaw;
- intentionally and without authority taking any animal or vehicle onto land vested in or under the control of HNZPT, except in accordance with a bylaw; and
- intentionally and without authority lighting any fire on land vested in or under the control of HNZPT, except in accordance with a bylaw.

42. The Bill does not contain powers for HNZPT to make bylaws. Assuming historical bylaws made by the HPT remain in force (somehow), it is unclear how these are to be altered. It is also unclear how controls will be made and notified to the public, and enforced, without the power for HNZPT to create new bylaws.

43. This is also an area where the "knows or reasonably ought to know" standard should apply. HNZPT may own and manage properties that appear to be public land, and it would be unduly harsh to impose an offence for entering these properties without knowledge that they are protected sites.

*Injunctions to prevent offences – clause 90*

44. Clause 90 provides for "injunctions to restrain commission of offences". Under this clause, the District Court may grant HNZPT an injunction to restrain any person from committing an offence under the Bill.

45. This can be compared with s 107(4) of the Historic Places Act, which provided that "The Trust may apply to the Court for a writ of injunction to restrain any person from breach of any duty or obligation imposed upon him or her by this Act, if he or she has threatened or already commenced to commit the breach or the Trust has reasonable cause to believe that such a breach is likely to occur."

46. There are a number of issues regarding the workability of these provisions. First, it is unclear who an injunction could be granted against, i.e. a landowner or also other parties. It is also unclear whether this would extend to an offence which may be committed, or is likely to be committed, or is contemplated; or whether it only applies to prevent the continuation of an ongoing offence. There are no details about the process required in applying for this injunction, which is significant given that an injunction under this clause is likely to be useful only if it can be speedily obtained.

47. It may be clearer to phrase the injunction as prohibiting the "doing of any act that would be likely to be an offence or breach of duty or obligation." It is anomalous to provide for an injunction to restrain the commission of an offence, which is unlawful anyway.

48. There may also be an issue of duplication with provisions under the RMA. Under section 314 of the RMA, enforcement orders can be granted to "require a person to cease or prohibit a person from commencing" any activity that contravenes the RMA or regulatory or planning requirements, or is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it is likely to have an adverse effect on the environment. Many activities that would constitute an offence under the Bill would also be captured by this section, because they would contravene heritage protection measures included in planning instruments. It may be simpler to expand section 314 to specifically include contraventions of the Bill. This would mean that the Environment Court, not the District Court, would be the decision maker. This would be consistent with the goal of improving the alignment between the RMA and heritage protection legislation.

*Penalties – stay of resource consent – clause 91(2)*

49. Clause 91(2) of the Bill will re-enact provisions in the Historic Places Act that allow the Environment Court to suspend the exercise of a resource consent or the carrying out of any permitted activity under a plan. It appears that the Environment Court has never imposed this penalty under the Historic Places Act. The penalty is triggered if the land is subject to a heritage order, and the owner or occupier is convicted of an offence under the RMA for a breach of a regional rule.

50. We submit in favour of deleting this clause. It appears directed at a situation where the penalties otherwise available are insufficient because of the potential economic gain if the site was put to an alternative use rather than maintained as an historic site. However, there are several problems with the clause as drafted. It is potentially overbroad, as it could in theory be triggered by a breach of a regional rule unrelated to heritage matters (for example, storm water discharge). It may not effectively achieve its aim, as there are no provisions to bind successors in title who would receive the benefit of consents that run with the land. It aligns poorly with the cancellation provisions under s 126 of the RMA and enforcement provisions under s 314. It is generally anomalous to include a penalty in one act for an activity that constitutes an offence under a different act. Finally, as this penalty has never been used under the Historic Places Act it is doubtful whether it is necessary.

*Public bodies authorised to make contributions – clause 95*

51. Clause 95 provides that a "public body of any kind" may make any contributions to HNZPT that it thinks fit for the purpose of providing funds for the exercise of HNZPT's functions. It is unclear what "public body" is intended to include. There is no definition of this term in the Bill.

52. It is also unclear whether this clause is intended to override express constraints on appropriations for particular public bodies. It may be desirable to state that the section authorises public bodies to contribute money, land, or artefacts regardless of their statutory limitations (i.e. repeat the phrasing of clause 96 in relation to local authorities).

53. It should also be clarified that non-monetary contributions may be made, including land or items of historic significance. However, HNZPT should be able to refuse a contribution if it is considered to be a liability (such as an historic site that is also a contaminated site). If land is involved, there might be Public Works Act offer back implications to consider.

*Transitional provisions – clause 101and 102*

54. The transitional provisions are contained in clauses 101 and 102. Clause 101 provides that "matters" to which the Historic Places Act applied that had commenced but were not completed as at the commencement of the new Act will be continued under the Historic Places Act as if it had not been repealed. In contrast, clause 102 provides that "proceedings" which commenced under the Historic Places Act but were not completed before the commencement of the new Act will be continued under the new Act.

55. The distinction between "matters" and "proceedings" is ambiguous at best, especially given the Privy Council's judgment in *Progressive Enterprises Ltd v Foodstuffs (Auckland) Ltd*,[1] which held that transitional provisions which retain the benefit of a more lenient statutory regime should be given an expansive reading rather than a restrictive reading, and therefore "proceedings" (in the context of amendments to the Commerce Act) is not restricted to court proceedings.

56. It is also unclear in principle why "matters" and "proceedings" should be treated differently.

Yours sincerely

Grant Hammond.

Hon Sir Grant Hammond
Chair

[1] *Progressive Enterprises Ltd v Foodstuffs (Auckland) Ltd* [2002] UKPC 25; [2004] 1 NZLR 145.