

Before the Proposed Te Tai o Poutini Plan Hearings Panel

In the Matter of

the Resource Management Act 1991
(Act)

And

In the Matter of

of a submission (S491) and further
submission (FS89) on the Proposed
Te Tai o Poutini Plan by Bathurst
Resources Limited and BT Mining
Limited

Legal Submissions for Bathurst Resources Limited and BT Mining Limited Topic 13

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INTRODUCTION

1. These legal submissions are presented on behalf of Bathurst Resources Limited (**'Bathurst'**) and BT Mining Limited (**'BT'**) (together **'Bathurst'**) in relation to Topic 13- Mineral Extraction. Bathurst made submissions (S491) and further submissions (FS89) on the proposed Te Tai o Poutini Plan (**'TTPP'**). Bathurst has appeared before the TTPP Hearing Panel on several other topics.¹
2. The minerals extraction topic is not only of critical importance to Bathurst, but also the social and economic well-being of the West Coast. Minerals extraction is the lynchpin of the West Coast economy. The s32 Report for the Minerals Extraction recognises that:²

The existing regulatory approach to managing these [existing mining] locations, facilities and resource in the operative plan is generic and lacks sufficient specificity and clarity to effectively and efficiently address the specific resource management issues identified. Consequently, an alternative approach is proposed that more explicitly recognises the unique nature of the hard coking coal resource, the existing mineral extraction operations and their contribution to the district and wider regional/national economy, and enables more flexible use and development of existing facilities and associated activities while ensuring that any associated effects are appropriately managed. It is also one that gives clear effect to the RPS, particularly objective 5.1 and associated policies 5.1 and 5.2 as well as the Strategic Objectives.

3. The s42 Report for Mining and Minerals recommends some significant changes to the Buller Coalfield Zone (**'BCZ'**) and the Minerals Extraction Zone (**'MINZ'**) that represent a significant departure from the approach adopted in the s32 Report. The result of those proposed changes are provisions that:
 - (a) Revoke rights granted under the Coal Mining Licences (**'CMLs'**) and Ancillary Coal Mining Licences (**'ACMLs'**) to continue and complete existing land use activities including rehabilitation and the continued use of existing structures and buildings;
 - (b) Do not provide a sufficiently enabling consenting regime for the expansion or development of new minerals extraction activities in line with the West Coast Regional Policy Statement (**'RPS'**) and the objective and policies of the TTPP;

¹ Hearing Topics 1, 2, 3, 4, 7, 9 and 10.

² Te Tai o Poutini Plan Section 32 Report 14 Mineral Extraction, at pages 33, 38 and 42.

- (c) Unreasonably constrain prospecting and exploration activities; and
 - (d) Do not adequately provide for the continued operation or upgrade of existing structures and buildings.
4. Bathurst's submission is that there is insufficient analysis or justification for the proposed changes in the s32AA Report. Bathurst also has concerns about the scope within submissions to make some of the changes sought in the s42A Report.

SCOPE OF SUBMISSIONS

5. The purpose of these legal submissions is to address Bathurst's submissions and the section 42A report recommendations regarding the BCZ and MINZ. Ms Hunter also makes some comments on the mining provisions in the Open Space and Recreation Zone and the General other relevant provisions in the TTPP relating to mineral extraction, exploration and prospecting activities in the region. No further comments are necessary from a legal perspective in relation to those provisions.
6. Accordingly, these submissions address:
- (a) Evidence to be presented;
 - (b) The legal framework;
 - (c) Bathurst's role on the West Coast;
 - (d) The context of the West Coast Policy Statement;
 - (e) Changes required to the objectives and policies for the BCZ and MINZ;
 - (f) Amendments to the BCZ and MINZ rules; and
 - (g) The definition of 'lawfully established'.

EVIDENCE TO BE PRESENTED

7. Bathurst has lodged the following evidence in support of its submission:
- (a) Planning – Ms Claire Hunter; and
 - (b) Economic – Dr Mark Sargent.
8. Both experts are available to answer questions.

LEGAL FRAMEWORK

9. The framework for the Hearing Panel’s decision making is set out in section 4 of the Strategic Directions Section 42A Report and in detail in the Section 23 of the s42A report for Mineral Extraction and is not repeated here.

BATHURST PERFORMS A CRITICAL ROLE ON THE COAST

10. The legal submissions for Topics 1 & 2A set out the background of Bathurst’s operations. Dr Sargent’s evidence sets out the crucial role the Buller district and the West Coast region play in the national mining industry:
- (a) Buller district contributes 6.6% of mining exports nationally; and
 - (b) The West Coast region contributes 7.1% of the mining exports nationally.³
11. At a regional and district level, mining plays an even more important role:
- (a) Mining on the West Coast contributed 8.4% of GDP, 3.8% of jobs and had productivity of \$340,469 per filled job (121% higher than for all industries).⁴
 - (b) Mining in Buller contributes 20% of the district’s GDP, 10.4% of filled jobs, and has a productivity 93% higher than all other industries (\$368,831 per filled job).⁵
12. Bathurst operations in the West Coast employ a total of 317 people. This figure amounts to 7.0% of the Buller workforce, and 1.9% of the West Coast workforce.⁶
13. The mining industry in Buller and the West Coast has been, and remains a vital component of the district and regional economic structure, because of its scale in terms of economic activity and employment.
14. The s32 Report for the minerals extraction topic recognises that:⁷

... [T]here was a strong view from the three district councils and West Coast Regional Council representatives that enabling the smooth transition of the Coal Mining Licenced sites into the TTPP process is a high priority to support social and economic wellbeing on the West Coast.

THE WEST COAST REGIONAL POLICY STATEMENT (RPS)

15. Ms Hunter outlines objective 5.1 of the RPS in her evidence. Objective 5.1 provides a very clear direction to “recognise the role of resource use and development in the West Coast and its contribution to enabling people and communities to provide for

³ Dr Mark Sargent, EIC at [17].

⁴ Dr Mark Sargent, EIC at [18].

⁵ Dr Mark Sargent EIC at [18].

⁶ Dr Mark Sargent, EIC at [19].

⁷ Section 32 Report 14, page 10.

their social, economic and cultural wellbeing". Policy 5.1 requires councils to "[e]nable sustainable resource use and development on the West Coast to contribute to the economic, social and cultural wellbeing of the region's community".

16. It is against this background that Bathurst and BT seek to ensure that the TTPP provides an efficient pathway for the continuation of mining of the West Coast's significant and high quality mineral resources.

OBJECTIVES AND POLICIES FOR THE BCZ AND MINZ

17. The s32 Report for the minerals extraction topic contains a comprehensive analysis of the notified provisions. In line with the objectives and policies of the RPS, the s32 Report recognises that:⁸

Minerals are significant resources on the West Coast. Specific zoning and associated provisions for these resources will enable them to be used efficiently. These efficiencies will contribute to economic well-being. Ensuring that these resources are used in a way that respects their surrounding environments, will help to maintain and enhance amenity values and the quality of the environment. In turn this will help people and communities to provide for their social and cultural well-being.

18. Following directions from the Panel, the strategic objectives for minerals extraction in the TTPP have been the subject of discussion between the parties. As noted by Ms Hunter, Bathurst and BT support a strategic objective "*to ensure the provision for the use and development of the region's mineral resources, recognising the important role that mineral extraction and ancillary activities on the West Coast have in contributing to the economic, social and cultural well-being of the region's people and communities*".⁹ This approach is in line with the RPS and also aligns with the approach in the s32 Report for minerals extraction.
19. The two special zones identified are both already subject to authorised mining and are geographically confined. The BCZ is a confined area that comprises the existing hard coking coal mines on the Stockton and Denniston Plateau. The MINZ encompasses specific spatial locations of existing mining and quarrying activity across the West Coast. Provision is also made for minerals extraction in the Rural and Open Space and Recreation Zones in recognition that some mineral resources are widespread across the region and not confined to a small number of locations.
20. The BCZ and MINZ objectives and policies are broadly similar. As noted above, Bathurst supports the notified version of the objectives and policies and the s32 analysis that supports those provisions. Various changes are made to the objectives

⁸ Section 32 Report 14, Mineral Extraction at page 27.

⁹ Memorandum of Counsel dated 23 November 2023.

and policies in the s42A Report and Bathurst is concerned about the shift in the focus of the objectives and policies as set out below.

BCZ-P1 and MINZ-P1

21. Ms Hunter's evidence requests the retention of the notified version of BCZ-P1 (and MINZ-P1 which is similar). The revised drafting is problematic because:
 - (a) BCZ-P1 now refers to the "Stockton Mine and surrounding areas" without mentioning the other parts of the Denniston Plateau which are currently being mined and which form part of this zone. The BCZ is geographically small, covered by existing minerals extraction permits and licences and the policy should apply to the entire area.
 - (b) BCZ-P1 and MINZ-P1 are limited to areas where there is a CML, an ACML and all necessary resource consents currently in place. It is not clear what the word "currently" means in terms of licences that are due to expire in a few years. It does not appear that the s42A Report writer fully understands how the land use components of CMLs and ACMLs operate. The s42A Report discussion about how the Coal Mines Act 1979 operates finishes mid-sentence.¹⁰ An overview of how CMLs and ACMLs operate is set out in paragraphs 50 to 58 below.
22. Bathurst submits that P1 should make provision for all mineral extraction activities within the BCZ while managing the effects on the environment. The rewording of P1 is convoluted and creates the potential for uncertainty in terms of how it should be interpreted.
23. The s42A Report writer also acknowledges there are scope issues in terms of the ability to make the changes proposed to BCZ-P1 and MINZ-P1:
 - (a) Bathurst does not agree that the s42A Report writer has scope under Karen Lippiatt's submission,¹¹ which seeks the deletion of P1 entirely,¹² to amend BCZ-P1 in the way proposed. The proposed amendments change the intent of the objective in a way that none of the submitters would have anticipated and does not align with the relief requested by any submitter.
 - (b) The s42A Report writer does not identify any submissions that provide scope for the amendments to MINZ-P1 and seeks to justify the changes as being necessary because it would be more 'appropriate' to include some of the wording in the Overview Section. The wording adopted from the

¹⁰ Te Tai o Poutini Plan Section 42A Officer's Report for Mining and Minerals at [177] and [350].

¹¹ Submission 439.035.

¹² Mining and Minerals Section 42A Report at [349].

Overview Section simply noted the various types of authorisations in the MINZ and the BCZ. They are not described as any kind of 'criteria'.

- (c) The s42A Report writer also suggests the amendments could be made under cl 16 of Schedule 1 of the RMA as a minor correction or error. Bathurst does not agree. As Ms Hunter points out, the changes alter the policy's purpose and structure and are not in accordance with the overall intent of the BCZ or the MINZ. The notified version of BCZ-P1 and MINZ-P1 should be retained.

Deletion of P5

24. The s42A Report writer has recommended deleting BCZ-P5 and MINZ-P5 on the basis that minerals extraction in significant ecological areas should be addressed in the ECO Chapter. Bathurst submits that the BCZ and MINZ policies should acknowledge the potential conflict that exists between accessing mineral resources and areas of significant indigenous biodiversity. Ms Hunter supports the Department of Conservation's submission requesting an amendment to ensure that any adverse effects on areas of significant indigenous vegetation and significant habitats of indigenous fauna are addressed according to the effects management hierarchy. This approach is consistent with the effects management hierarchy adopted in the RPS.

CHANGES TO THE RULES IN THE BCZ AND MINZ

25. The section 42A report writer has substantially rewritten the rules in the BCZ and the MINZ. The implications of the key changes on both existing and future mining are discussed below.

Prospecting and exploration

26. The confined and targeted nature of prospecting and exploration activities means that their effects are temporary, very localised and can be readily managed. In the notified version of the TTPP, prospecting and exploration were permitted in the BCZ and MINZ provided 5 days' notice was provided, and topsoil was returned and managed so that it would not enter waterways or destroy habitat (BCZ-R-1 and MINZ-R1). Activities not meeting the permitted activity standards defaulted to controlled activities.
27. Prospecting and exploration remain permitted activities under the s42A Report but only if they are authorised by a permit, and comply with new limits on the location and volume of earthworks. In addition, activities not complying with the permitted activity standards default to restricted discretionary activities. If the restricted

discretionary standards cannot be met, a consent for a discretionary activity is required.

28. The justification for the proposed changes are set out in s32AA section of the s42A:¹³

a. The provisions for Mineral Prospecting and Mineral Exploration across the various zones will be clearer and more aligned with the direction within the applicable objectives and policies;

b. They will bring greater consistency to the management of Mineral Prospecting and Mineral Exploration across the various zones, noting subtle differences between each zone in accordance with their respective objectives and policies; and

c. They will better give effect to the direction within the objectives and policies for the various zones regarding the management of adverse effects on the environment, which I consider are not achieved by the provisions as notified.

29. The proposed amendment that would make minerals exploration and prospecting not provided for as a permitted activity default to restricted discretionary or discretionary lacks any credible justification given:

(a) The localised nature of the effects of exploration and prospecting and the fact that they can readily be avoided, remedied or mitigated;

(b) The completely arbitrary earthworks threshold that has been chosen;

(c) The objectives and policy context within the TTPP, which is focused on enabling minerals extraction, and exploration and prospecting is a critical component of accurately determining where the resources are located; and

(d) The absence of any attempt to quantify the costs of requiring more consents or the delays that will result.

30. Bathurst does not agree that the proposed changes provide a “*clearer and consistent rule framework that appropriately address the management of adverse effects on the environment*” as argued in the s42A Report.¹⁴ For the reasons set out in the s32 Report, a default to a controlled activity status would give effect to the objectives and policies in a more cost effective way while ensuring the effective and appropriate management of potential effects.

31. As highlighted by Ms Hunter, the inclusion of an excavation limit applying to a ‘site’ also creates an inconsistent approach where smaller sized allotments over a

¹³ Mining and Minerals Section 42A Report, at [828].

¹⁴ Mining and Minerals Section 42A Report, at [829].

particular area are better positioned under this rule.¹⁵ The 5,000m³ figure appears to originate from Buller District Council's submission on other zones such as the GRUZ.¹⁶ We have been unable to locate scope in any of the submissions to introduce an earthworks standard into the BCZ or MINZ.

Buildings and ancillary activities

32. A range of activities occur in the BCZ and the MINZ as part of mineral extraction activities including roads, workshops, storage of materials, coal washeries, water treatment facilities, coal load areas and transport activities. The s32 Report notes that the intent of the BCZ is to *“enable the existing authorised activity to continue, including further development of the mines and coal processing within the zone”*.¹⁷
33. The s42A report redrafts BCZ-R3 and MINZ-R3 to permit *“the maintenance and operation of all roads, parking, buildings, water treatment facilities, storage facilities, railway loadout areas and structures existing at the date of notification of the Plan that are lawfully established at the date the Plan becomes operative”*. This rule does nothing more than state that these existing activities have existing use rights, which is the case under the RMA in any event. The effect of this rule is that all new ancillary activities to support existing mining activities will require a consent for a restricted discretionary activity regardless of their scale or nature. There is no permitted activity status for new buildings and ancillary activities in either zone. The default activity status has also been amended to restricted discretionary.
34. The s32AA analysis notes that there will be costs associated with these changes and more resource consents will be triggered.¹⁸ However the s32AA analysis considers that the notified provisions were not clear or measurable, that changes are required to align with the objectives and policies, and that there will be greater consistency in the rule framework.¹⁹ Bathurst submits that the s32AA analysis is fundamentally flawed in that no consideration has been given to:
 - (a) The nature or scale of the ancillary activities that may be undertaken;
 - (b) The potential effects generated by those activities; and
 - (c) The likely costs and time delays associated with processing of resource consent applications.

Standard 4 in BCZ-R3 and MINZ-R3

¹⁵ Ms Hunter Topic 13 EIC, at [74].

¹⁶ See Mining and Minerals Section 42A Report, at [572].

¹⁷ Section 32 Report 14, page 21.

¹⁸ Mining and Minerals Section 42A Report, at [833].

¹⁹ Mining and Minerals Section 42A, at [832] for both BCZ and MINZ.

35. Bathurst opposes the deletion of standard 4 in BCZ-R3 and MINZ-R3 and requests the amendment of MINZ-R3 to 50 heavy vehicle movements to align with the BCZ. Transport issues have already been heard at the Energy, Infrastructure and Transport hearing on 27 November 2023 (and reconvened on 15 February 2024). Expert conferencing also occurred on 26 January 2024. The Reporting Officer's right of reply for that topic dated 8 March 2024 notes that:²⁰
- (a) NZTA seeks to change the high trip generating activities standard by converting the triggers to equivalent car movements (ECMs);
 - (b) Bathurst seeks consistency for the trip generation thresholds for mining within the plan (there is inconsistency between the Transport Chapter and the BCZ and MINZ zones) and also seeks that the threshold should be 50 heavy vehicle movements (HVM) per day as provided for in the notified version of the TTPP (the threshold in the MINZ was 30 HVM per day); and
 - (c) There was general agreement at the expert witness conferencing that the vehicle movement triggers for mining should be consistent.
36. NZTA's submission on Table TRN 6 row 13 (relating to mixed use or other activities not otherwise listed in this table) requested a change from '60 vehicle movements per day' to '30 ECMs'. NZTA did not submit on any other rows within TRN 6, and specifically did not submit on the heavy vehicle movement threshold for mining in row 5. Similarly, NZTA did not submit on the permitted activity rules within the BCZ and MINZ containing heavy vehicle thresholds (BCZ-R3(4) and MINZ (R4(4))).
37. NZTA lodged expert traffic evidence (Mr Swears) and planning evidence (Mr Pearson) for the Transport Hearing requesting that ECMs should apply throughout the TTPP instead of specific vehicle thresholds. Mr Pearson's evidence²¹ states that "*Waka Kotahi requested amendments... that the heavy vehicle numbers for mining and quarrying volumes be reduced with traffic volumes based on equivalent car movements (ECM) per day rather than heavy vehicle movements per day*".
38. At the Transport hearing, the Hearing Panel requested that NZTA provide further information on whether NZTA had scope to ask for certain changes, including the change to ECMs in Table TRN 6. Mr Pearson lodged a supplementary statement on 5 December 2023 clarifying that:²²

I consider that there is scope to make some changes to TRN Table 6, but there was no specific submission point broadly seeking changes to all of the thresholds related to specific activities listed in the table.

²⁰ Energy Infrastructure and Transport Right of Reply, dated 8 March 2024, see section 7.2.

²¹ Ibid, section 5.2.

²² Stuart Pearson, Supplementary Statement to the Transport Chapter, dated 5 December 2023, at page 2.

39. Against this background, it is clear that NZTA does not have scope to request any changes to the heavy vehicle thresholds that apply to mining activities either in TRN 6 line 5 or the BCZ or MINZ.
40. Ms Hunter's evidence makes it clear that if the trigger was changed from 50 HVMS to 50 ECMs, complying with the permitted activity status would be impossible for mining operations. A daily snapshot of data from a 24 hour period from Stockton showed a total of 260 movements of all vehicles, 23 of which were heavy vehicles. Each truck movement would equate to more than one ECM (either 5 ECMs as per paragraph [27] of Mr Swears' evidence for the Transport Chapter, or 10 ECMs as per paragraph [6.8] of Mr Pearson's evidence for the Transport Chapter), and would include all small vehicles from workers who travel by car.
41. Furthermore, mining operations are typically 24 hour (or close to it) operations with multiple changes in shifts, so an ECM which captures all small vehicles is simply unworkable. Given that the BCZ and MINZ are intended to be zones that are permissive for mining activities (as clear from the objectives and policies) it would be completely at odds with the purpose of these zones to have a very low threshold for traffic coming to the site, so as to effectively require consent for the staff vehicles.
42. Bathurst's position remains in that the trigger for vehicle movements for mining activities should be 50 HVMS and this should be consistent across the plan. As noted by Ms Hunter, the trigger should either be within the Transport Chapter (TRN 6) or within the MINZ and BCZ chapters.²³

Mineral extraction and processing

43. The notified version of BCZ-R2 and MINZ-R2 provides for minerals extraction and processing that is 'lawfully established' at the date the Plan becomes operative as a permitted activity (subject to compliance with various requirements). Bathurst's submission requested changes to the definition of 'lawfully established' to clarify that all activities authorised under CMLs are 'lawfully established' even where that licence has expired. This approach is in line with the approach in the s32 Report which states:²⁴

The proposed rules and standards [in the notified version of the TTPP] are effective as they recognise the important functional contribution these facilities make to the district and explicitly respond to the operational and development requirements of each facility, including clearly identifying activities that are permitted as of right along with relevant thresholds that trigger the need for resource consent. This, in turn, offers increased clarity and certainty to facilities as well as the community more

²³ Ms Hunter, Topic 13 EIC, at [72].

²⁴ Section 32 Report 14, at [4.2.1].

generally, and provides flexibility to enable these facilities to develop and adapt while ensuring that any impacts on adjacent areas are minimised.

44. The s32 Report also notes the benefits of the notified rules including:²⁵
- (a) Directly recognises and enables the continued use of the lawfully established mineral extraction operations for this significant economic use; and
 - (b) Provides the existing activities with increased flexibility to develop and adapt, thereby leading to improved efficiencies in land use.
45. The s42A Report provides for extraction and processing of minerals resources as a permitted activity if lawfully established at the date the TTPP becomes operative and adopts the amended definition of 'lawfully established' from the s42A report for the Introduction and General Provisions topic.²⁶ The amendments proposed at that hearing exclude situations where coal mining licences (or resource consents) have expired and have not been renewed from the definition. The amendments have the effect of:
- (a) Providing **only** for activities that are **already permitted** under CMLs/ACMLs as permitted activities – this approach simply restates what is permitted as of right under the law in any event;
 - (b) **Extinguishing land use rights** that have been **established under CLMs/ACMLs** and continue beyond the date of expiry of the CMLs/ACMLs – this approach purports to extinguish rights provided under the CMLs/ACMLs by requiring consents for these activities and is ultra vires.
 - (c) Requiring resource consents for **any scale of new minerals extraction** or processing activities as a restricted discretionary or discretionary activity – the amendments impose a blanket requirement for consent regardless of the scale of the activity, without any consideration of the potential effects, the purpose of the BCZ and MINZ (to enable minerals extraction while managing effects) and without adequate consideration of the costs and benefits of requiring consent.
46. Bathurst submits that the definition of 'lawfully established' and how it impacts the BCZ and MINZ is an issue that must be considered at this hearing. The s42A Report for the Introductions and General Provisions²⁷ makes it very clear that Bathurst's submissions on the definition of 'lawfully established' were **not** addressed as part of

²⁵ Section 32 Report 14, page 35.

²⁶ Mining and Minerals Section 42A Report at [101].

²⁷ Te Tai o Poutini Plan Section 42A Officer's Report Introduction and General Provisions, at [16] and [21] and [352].

that hearing stream. Legal submissions for Bathurst in the Topic 1 and 2 hearing record the agreement with the s42 Report Writer in those topics that the definition of 'lawfully established' would be address in the mineral extraction topic.²⁸ No evidence was provided by Bathurst on this issue at the Topic 1 and 2 hearings in reliance of the statement in the s42A Report that the issue would be addressed as part of the Mineral Extraction Section 42A Report. This definition is considered further in paragraphs 50 to 58 below.

47. Ms Hunter's alternative drafting for R2 is set out in paragraphs 64 and 81 of her evidence and in summary would provide:

(a) Permitted activity status:

(i) Activities entirely consistent with existing mining licences or permits in the BCZ/MINZ; and

(ii) Exploration and prospecting activities in the BCZ/MINZ.

(b) Controlled activity status:

(i) Activities within areas of existing mining licences or permits but not complying with existing conditions; and

(ii) Exploration and prospecting activities in the BCZ/MINZ not complying with the permitted activity standards.

(c) Restricted Discretionary (RD) Activity status:

(i) Activities outside areas of existing mining licences or permits subject to restricted discretionary activity standards being met.

(d) Discretionary activity status:

(i) Activities outside areas of existing mining licences or permits and not meeting the RD standards.

48. In Counsel's view, while this framework is supported by Ms Hunter (and Bathurst), an even more enabling set of rules would not be out of step with the objectives and policies of the RPS, the BCZ and the MINZ.

49. The definition of 'lawfully established' is critical to the way the rules operate and is discussed below.

DEFINITION OF 'LAWFULLY ESTABLISHED'

²⁸ Bathurst Legal Submissions Topic 1 and 2, paragraph [25].

50. Counsel's view is that the use of the term 'lawfully established' in the TTPP creates confusion and interpretation issues in the context of the existing CMLs. It is very unusual for a district plan to specifically use rules to provide for 'lawfully established' activities as a permitted activity. Under s10 of the RMA, an activity is 'lawfully established' if it has a resource consent or was a permitted activity under the relevant provisions of the district plan at the time the activity was established and the effects are the same or similar in character, intensity and scale to those which existed before the rule became operative. It appears that the purpose of the rules making some 'lawfully established activities' permitted activities, may be to ensure that they are permitted even where the second limb of the existing use rights test in s10 cannot be satisfied (i.e. where the character intensity and scale) has changed.
51. Putting that aside, Bathurst's key concern is that the definition has been amended in a way that purports to revoke rights established under the CMLs/ACMLs that are protected by the transitional provisions in the CMA 1991 and is therefore ultra vires. A CML is a package of rights to undertake minerals extraction including the right to win the minerals and undertake land use activities. Ms. Hunter's evidence includes a useful description of the package of rights contained within the CML for the Stockton mine.²⁹
52. In *New Zealand Steel Limited v Attorney-General*³⁰ the High Court held that the transitional provisions in the CMA 1991 preserve the activities authorised by CMLs as 'existing privileges' or a bundle of statutory rights. CMLs do not authorise mining activities as 'permitted activities' nor are they 'deemed resource consents'. CMLs confer a comprehensive set of rights on the holder, including to undertake the land use activities encompassed in the licence. In this sense CMLs are unique when compared to any other land use activities that are subject to the RMA.
53. The amendments to the CMA 1991 in 2013 removed the previous right to renew CMLs. Upon expiry of a CML, a new permit is required under s25 of the CMA 1991 to continue the **right to mine** the area. The aim of the amendment was to require a new mining permit under the CMA 1991 as opposed to a new right directed at the land use aspects of mining activities which are covered under the RMA. Just like the vast majority of land use consents, the land use aspects of CMLs were never intended to 'expire'. The intention was to roll them over as part of the CML renewal process.
54. The effects of the land use activities being undertaken have already been assessed as part of the CMLs, and the authorised activities have been implemented in reliance on those rights and accordance with the conditions attached to the CMLs. In

²⁹ Ms Hunter, Topic 13 EIC, at [24]- [25].

³⁰ [2013] NZHC 3524 at [62] to [67].

addition, separate regional consents are required for all mining activities. All of the land use activities authorised by the CMLs are currently underway and most remaining activities relate to rehabilitation. Rehabilitation of the Stockton mine is provided for financially under the following:

- (a) The Crown Indemnity (provided by the Government) to cover rehabilitation required for historical disturbances at Stockton (i.e. to cover pre-existing liabilities for land previously mined by the Crown by State Coal Mines and its state-owned enterprise Solid Energy New Zealand Ltd).
 - (b) The Deed of Commitment relating to treatment of acid mine drainage (AMD). AMD occurs when rock is exposed through mining activities to air and water, and a reaction occurs, requiring treatment before it enters waterways. The Deed requires the Crown to take financial responsibility for the historic AMD liabilities at Stockton arising from mining by State Coal Mines and Solid Energy New Zealand Ltd.
 - (c) Additional bonding provided by BT Mining under the Deed Relating to Bonding between the West Coast Regional Council, Buller District Council and BT Mining Ltd. The Deed required that BT Mining provide a bond to the Councils as security for non-AMD rehabilitation of the Stockton Plateau. The Councils can call on the bond for the purpose of re the land within the CML/ACMLs if BT Mining fails to carry out its rehabilitation obligations.
55. This complicated matrix of deeds provides for the agreed rehabilitation of the Stockton mine in accordance with the terms of the CML. It is simply not feasible from a contractual perspective (or a practical perspective) to introduce new land use requirements (which may frustrate the ability to carry out the completion of the mining and rehabilitation provided for by the underlying CML/ACMLs) into the mix.
56. If land use rights expire when the CMLs expire, then there would be a situation where completed and partly completed minerals extraction activities that form part of the existing environment (including rehabilitation activities and existing structures) would in theory immediately become unauthorised. This would be an irrational outcome in the BCZ and the MINZ, which are two relatively confined areas that have been identified as areas that are appropriate for enabling minerals extraction.
57. As Ms Hunter sets out in her evidence, other councils have addressed this issue by 'grandfathering' the activities authorised in the CMLs into their district plans as a permitted activity. This approach, which allows for activities which are authorised by CMLs or ACMLs to continue beyond expiry of the CML, has been adopted in the Hauraki and Waitaki Districts.

58. The outcome can be achieved by amending the definition of 'lawfully established' as set out in Ms Hunter's evidence to include reference to Schedule Nine (which contains a full a list of existing licences and permits) and additional wording to ensure that it is clear that associated land use activities continue to be permitted after the expiry of the relevant licence.

CONCLUSION

59. Bathurst supports recognition in the TTPP of the significance of mining and minerals resources on the West Coast and an enabling regime that enables not only existing mining operations to continue to operate but also new mining within the geographical areas covered by the BCZ and the MINZ. The amendments sought to the provisions by Bathurst have been summarised above and are comprehensively covered in Ms Hunter's evidence. Critically the TTPP provisions must enable the continued operation of land use activities and structures authorised under the CMLs and ACMLs past their expiry date to avoid the need to disestablish or reconsement partly finished activities including rehabilitation.

Christina Sheard / Joshua Leckie

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