PHANZA
Professional Historians' Association of New Zealand/Aotearoa

PO Box 1904
Thorndon
Wellington 6140

president@phanza.org.nz

Professional Historians' Association of New Zealand/Aotearoa, submission to the Environment Committee on the Fast-track Approvals Bill (31-1)

1. The Professional Historians' Association of New Zealand/Aotearoa (PHANZA) is pleased to make a submission to the Environment Committee (the Committee) on the Fast-track Approvals Bill (the Bill). This submission has been prepared by the PHANZA committee. Due to the short time available for submissions, it has not been possible to consult our members on the content of the submission.

2. PHANZA represents the interests of professional historians in Aotearoa New Zealand. We currently have 178 members, who work in a range of roles across the country. Some are employed by central or local government, or in places such as archives, museums or universities, while others are independent contractors. One of the roles of PHANZA under our constitution is to represent professional historians in public discussions, such as about relevant policy and legislative proposals.

3. PHANZA **opposes** the Bill and **recommends** that it does not pass in its current form. Our submission also recommends a number of changes that should be made to the Bill if it does proceed. The focus of this submission is on the implications of the Bill for protection of historic heritage under the Resource Management Act 1991 (RMA) and the Heritage New Zealand Pouhere Taonga Act 2014 (HNZPTA), but we also make some more general observations.

4. PHANZA considers that the Bill fails to learn from past experience of the dangers of prioritising economic development over natural and historic heritage; is inconsistent with good democratic process and decision-making; and does not adequately recognise Te Tiriti o Waitangi. The Bill has been informed by an inadequate policy process, particularly in relation to heritage. Above all, the Bill does not simply create a faster process for approving significant infrastructure and development projects, but instead prioritises economic development over all other considerations, including protection of historic heritage.

5. PHANZA has had the opportunity to read submissions on the Bill from the New Zealand Archaeological Association and ICOMOS Aotearoa New Zealand. PHANZA supports the overall position of those submissions on the Bill, and specific points in those submissions that are additional to those in this submission, particularly in relation to archaeological authorities.

Introductory comments

Historical perspective

6. PHANZA has a number of members who research and write about heritage, environmental history and history relating to Te Tiriti o Waitangi and Māori claims under Te Tiriti. We expect that some of our members will make individual submissions to the Committee. If it would be helpful, we would be happy to try to arrange a briefing for the Committee from PHANZA members who could explain particular issues in more detail and help to set concerns about the Bill in historical context.

7. PHANZA recognises that any government needs to balance competing interests, including economic development and the provision of necessary infrastructure on the one hand, and environmental protection and preservation of historic heritage on the other. However, since the start of British colonisation of Aotearoa, the extraction of wealth from the land and sea has too often been privileged over protection of ecosystems, native plants and animals, and a healthy environment. By the 1970s, there were growing calls for a change of approach, so that economic growth did not come at the expense of environmental sustainability. Government over-reach in the form of the Muldoon Government's 'Think Big' programme, and the National Development Act 1979 (the fast-track legislation of its day), led to the creation of the RMA. Whatever the RMA's flaws, it allowed for the balancing of different interests and, importantly, for public participation in decision-making. By once again prioritising development over the environment and removing opportunities for public input, the Bill fails to learn from past mistakes.

8. Nor does the Bill take account of past failings in the protection of sites of historic significance, and particularly places of significance to Māori. There is some irony in this Bill going through the House at the same time as Te Pire mō Ō-Rākau, Te Pae o Maumahara/Ō-Rākau Remembrance Bill, which returns the site of the 1864 battle of Ō-Rākau to iwi. The construction of a road through the Ō-Rākau battle site is one of many examples of past desecration of sites that provide evidence of Māori history, or of the shared history between Māori and later arrivals. The recent struggle to protect land at Ihumātao, an area of great importance in the Māori history of Tāmaki Makaurau/Auckland, from housing development is another example of the tensions between heritage and development. Such tensions can only be managed through effective consultation and dialogue. Sites of historic importance to Pākehā and other communities have also been lost forever through an earlier single-minded focus on development.

Process and democratic decision-making

9. This Bill raises significant concerns about both the process by which the Bill is being developed and considered, and the processes that would be established by the Bill itself:

    - The Bill has been prepared with inadequate time for proper policy analysis, as shown by the limited nature of the Supplementary Analysis Report (SAR) prepared by the Ministry for the Environment, and the lack of a full Regulatory Impact Statement.

    - The period for submissions on such an important, complex and far-reaching Bill is completely inadequate.

- There will be no opportunity for public submissions on the list of projects in Schedule 2A of the Bill. These projects will be referred directly for consideration by an external panel, avoiding some process requirements that would otherwise apply.
- The Bill itself:
    - gives a small number of Ministers extraordinary decision-making powers that are largely unchecked
    - provides only very limited opportunities for relevant interests to comment on fast-track approvals, and no opportunity for input from the public
    - severely limits timeframes and restricts rights of appeal in relation to fast-track approvals.

10. For these reasons, PHANZA believes the Bill is inconsistent with effective democratic process and sound, evidence-based decision-making.

Te Tiriti o Waitangi

11. PHANZA has Māori members, but this submission does not claim to represent Māori views on the Bill. However, as historians, we are very aware that past infrastructure development described as having national or regional benefits has often brought no direct benefit to Māori. At the same time, infrastructure projects have too often had very immediate adverse impacts on Māori livelihoods, wellbeing and rights, particularly rights relating to whenua, moana and wāhi tapu.

12. The Bill includes a requirement for those exercising functions and powers under it to act consistently with existing Treaty settlements and recognised customary marine and coastal area rights (clause 6). It also includes some protections relating to 'identified Māori land', as defined in the Bill, and some requirements to consult relevant iwi, hapū and other Māori groups. Nonetheless, these protections are inadequate. They prioritise Māori groups that have completed Treaty settlements over those that have not, and fail to account for the importance to Māori of land that is no longer 'identified Māori land' as a result of past Treaty breaches. PHANZA considers that the Bill creates a very real likelihood of new breaches of Te Tiriti o Waitangi due to the privileging of development over other considerations, including the rights and interests of Māori.

13. PHANZA **recommends** that the Bill be amended to strengthen Tiriti o Waitangi protections in relation to fast-track approvals, ideally through a stand-alone Tiriti clause.

Our primary concern with the Bill

14. As others have observed, the Bill is misnamed. It does not simply create a fast track for approving infrastructure projects of regional or national significance. Rather, it privileges rapid and cost-effective delivery of projects above all other considerations, including the protection of historic heritage. In particular:

- The Bill's purpose (clause 3) is solely focused on infrastructure and development, with no mention of sustainable management of resources or conservation of natural or historic heritage.
- Under clause 17 of the Bill, the eligibility criteria Ministers must consider in deciding whether to refer a project to an expert panel relate only to the fast and efficient delivery of projects with significant regional or national benefits. While criteria for assessing regional or national benefit are provided, this assessment will rest entirely with three Ministers whose portfolios are focused on infrastructure and development. There is no requirement to consider whether the purported benefits are likely to outweigh the foreseeable risks to the natural or historic environment.
- Expert panels, in their consideration of applications under the Bill, are expressly required to give greater weight to the purpose of the Bill than to all other factors, including protection of historic heritage under the RMA and HNZPTA (schedule 4, clause 32; schedule 7, clause 4(1)(b)(iii)).

15. For this reason, PHANZA opposes the Bill and **recommends** that the Bill not proceed. Other concerns raised in this submission lend weight to this primary concern. While this submission makes a number of recommendations for changes that could be made to the Bill to mitigate our concerns, our key recommendation is that the Bill should be rejected.

16. It may be that a good policy case, backed by evidence, can be made for a faster process to approve significant infrastructure and development projects. If so, the Government should introduce a new Bill that focuses on these process issues but still ensures that decision-making appropriately balances development with environmental and heritage protection.

The place of heritage in the Bill

17. Heritage places play an important role in shaping and supporting our sense of family, local, national, and whānau, hapū or iwi identities. They connect us to, and help us to understand, our past and the lives of our tūpuna/tīpuna/ancestors. For historians, they provide important evidence about how people lived in the past, and the environment within which historic events occurred.

18. At the risk of oversimplification, legislation protects historic heritage in two main ways:

    - The HNZPTA establishes Heritage New Zealand Pouhere Taonga (Heritage New Zealand) and the Māori Heritage Council to provide heritage oversight and advice, and provides protections for archaeological sites (places associated with human activity before 1900, or that have been declared by Heritage New Zealand to be archaeological sites).
    - Historic places and places of ancestral significance to Māori are given legal protection under the RMA through listing by territorial authorities in district plans.

19. The Bill affects both the protection of historic heritage under the RMA and the protection of archaeological sites under the HNZPTA. This submission addresses the heritage impacts under both pieces of legislation. Due to the inadequate time provided for public submissions on the Bill,

this submission does not consider potential impacts of the Bill on heritage sites on conservation or reserve land under the Conservation Act 1987 or the Reserves Act 1977.

Heritage New Zealand Pouhere Taonga Act

20. The HNZPTA was passed in 2014 by the then National-led Government, with support from almost all parties in the House. One important role of the HNZPTA, and of Heritage New Zealand under that Act, is to protect archaeological sites by requiring an authority to be obtained before an archaeological site can be modified or destroyed.

21. Archaeological authorities under the HNZPTA are covered by this Bill (schedule 7) even though there is no evidence that such authorities are an obstacle to the development of regionally- or nationally-significant infrastructure. The SAR for the Bill states that there has been very limited analysis of the problem definition for the Bill in relation to non-RMA legislation, including heritage legislation, and that any barriers posed by heritage approvals are not well understood.[1] The SAR leans heavily on a report on the cost of consenting infrastructure projects by Sapere consulting for the New Zealand Infrastructure Commission Te Waihanga. The Sapere report explicitly excluded consideration of non-RMA approvals, such as those from Heritage New Zealand.[2]

22. It therefore appears that there is no evidence that archaeological authorities under the HNZPTA need to be included in this Bill in order for the Bill to achieve its objectives. The Bill does provide that the fast-track application process for archaeological authorities only applies if an applicant also applies for a consent under the RMA using the Bill's fast-track process, and if the authority is needed for a proposed listed or referred project under the Bill (schedule 7, clause 1(2)). We understand this to mean that a person could not apply under the Bill solely for an archaeological authority. Nonetheless, it remains unclear whether schedule 7 of the Bill is needed to facilitate infrastructure and development projects.

23. PHANZA **recommends** that schedule 7 (and all other provisions of the Bill dealing with archaeological authorities) be deleted from the Bill. Further analysis and policy work should be undertaken to determine whether archaeological authorities under the HNZPTA present an obstacle to the timely delivery of relevant projects. If a need for a fast-track process in relation to archaeological authorities is identified, such a process could be added to the HNZPTA in a way that is appropriately tailored to the scheme of that Act, and that could be integrated with processes established under the Bill.

Resource Management Act

24. The vital role of the RMA in protecting historic heritage is poorly understood outside the heritage sector. It is clear that heritage has been somewhat of an afterthought in the policy work on this Bill, including in the provisions dealing with the RMA. This submission makes recommendations about how those provisions could be improved, if the Bill proceeds.

[1] Ministry for the Environment, *Supplementary Analysis Report: Fast-track Approvals Bill*, 29 February 2024, pp 4, 11.
[2] Sapere, *The Cost of Consenting Infrastructure Projects in New Zealand: A Report for the New Zealand Infrastructure Commission/Te Waihanga*, July 2021, p 34.

Decision-making by joint Ministers

25. As stated above, PHANZA considers that the Bill gives extraordinary environmental decision-making powers to a small group of Ministers, all of whom are focused on infrastructure and economic development. In doing so, the Bill fails to safeguard either democratic and constitutional principles, or environmental and heritage protection.

26. If the Bill proceeds largely in its current form, PHANZA's concerns could be mitigated somewhat by including a wider range of Ministers in decision-making. We **recommend** that joint Ministers should also include the Minister for the Environment, the Minister of Conservation, and the Minister for Arts, Culture and Heritage. Including these Ministers would help to bring greater balance to decision-making, by involving Ministers whose focus is on environmental and heritage conservation and protection. Since PHANZA's focus is on historic heritage, we note that the Ministers for the Environment and Conservation have responsibilities for heritage under the RMA and the Conservation Act respectively, as well as responsibilities for the natural environment. If the Committee does not agree with the recommendation to add all three additional Ministers to the group of joint Ministers under the Bill, we recommend that at least the Minister for the Environment be included.

27. Alternatively, if the recommendation to include additional Ministers in the definition of 'joint Ministers' is not accepted, we **recommend** the following lesser mitigations:

    - In preparing its report under clause 25, an expert panel must consult the Ministers for the Environment, Conservation, and Arts, Culture and Heritage (in addition to the Ministers already mentioned in clause 25(2)).
    - In relation to an archaeological authority under the HNZPTA, the Minister for Arts, Culture and Heritage be included in the definition of joint Ministers.

Other matters

28. If the Bill proceeds, PHANZA also draws the Committee's attention to the following matters, and makes recommendations for amendments that could mitigate concerns about the Bill.

National Historic Landmarks

29. Section 81 of the HNZPTA requires Heritage New Zealand to maintain a list of National Historic Landmarks. These are places of outstanding national heritage value. They are recognised in order to promote their appreciation, and to ensure their conservation to the greatest extent practicable. There are currently two National Historic Landmarks, the Waitangi Treaty Grounds and the National War Memorial, but the intention is that the list will be added to over time. It would be extraordinary if the fast-track approval process allowed development that would have adverse effects on these places.

30. PHANZA **recommends** that the Bill be amended to provide that no project may be approved under the fast-track approvals process if it would have an adverse effect that is more than minor on a National Historic Landmark. If the Committee does not accept this recommendation, PHANZA **recommends** that the Bill provide that, in respect of projects that would occur on land that

includes a National Historic Landmark, the Minister for Arts, Culture and Heritage be a relevant portfolio Minister for the purposes of clause 19(1)(b).

Referral applications

31. Clause 14 sets out matters that be included in an application for a project to be considered under the fast-track approvals process. PHANZA **recommends** that these matters should include identifying any of the following within the project area, regardless of whether or not these sites are also listed under a district plan: a historic place, historic area, wāhi tapu, wāhi tapu area, wāhi tūpuna, or National Historic Landmark included in the New Zealand Heritage List/Rārangi Kōrero under the HNZPTA.

32. Clause 14(3)(w) provides that an application must include a summary of any compliance or enforcement action taken against the applicant under the RMA. PHANZA **recommends** that this should also include any action taken against the applicant under the HNZPTA or other relevant legislation.

33. It appears that decisions about applications for fast-track approval will be based to a significant extent on the information provided by applicants. This is a significant concern, since applicants may have a strong incentive to provide information that does not tell the full story of the potential impacts of the project. PHANZA **recommends** that the Committee consider introducing consequences in the Bill for an application that is false or misleading, or omits relevant information, in relation to the matters set out in clause 14, where the false, misleading or incomplete information has a significant bearing on whether the application should be approved or not. For example, the Bill could provide for approval to be subsequently revoked in such cases.

Persons that must be invited to comment on projects

34. Clause 20 of schedule 4 (which deals with approvals under the RMA) provides that certain persons must be invited to comment on a listed or referred project. PHANZA **recommends** that the following should be added to the lists of persons in clause 20(3) and (4):

    - any heritage protection authority approved under section 188 of the RMA in respect of a place that is within the project area
    - relevant non-government organisations like those listed in schedule 6, clause 17(6) of the COVID-19 Recovery (Fast-track Consenting) Act 2020, including organisations that advocate for historic heritage.

35. These organisations should also have standing to bring an appeal against a decision of joint Ministers under clause 26 of the Bill.

36. In addition, the Bill currently requires Heritage New Zealand to be invited to comment only on referred projects. PHANZA **recommends** that Heritage New Zealand should also be invited to comment on listed projects.

Summary of recommendations

37. PHANZA **recommends** that the Bill not be passed.

38. If the Committee decides that the Bill should proceed further, PHANZA **recommends** the following amendments:

- Tiriti o Waitangi protections in the Bill should be strengthened, ideally through a stand-alone Tiriti clause.
- Schedule 7 and related provisions should be deleted from the Bill pending further policy work on the case for a fast-track process for archaeological authorities. If such a case can be made, a fast-track process tailored to the HNZPTA should be introduced through amendments to that Act.
- The Minister for the Environment, Minister of Conservation and Minister for Arts, Culture and Heritage should be added to the definition of 'joint Ministers' in the Bill; or, at least, the Minister for the Environment should be among the joint Ministers. **Alternatively**, but less desirably:
    - In preparing its report under clause 25, an expert panel should be required to consult the Ministers for the Environment, Conservation, and Arts, Culture and Heritage.
    - In relation to an archaeological authority under the HNZPTA, the Minister for Arts, Culture and Heritage should be one of the joint Ministers.
- The Bill should provide that no project may be approved under the fast-track approvals process if it would have an adverse effect that is more than minor on a National Historic Landmark listed under section 81 of the HNZPTA. **Alternatively**, but less desirably, the Bill should provide that, in respect of projects that would occur on land that includes a National Historic Landmark, the Minister for Arts, Culture and Heritage should be a relevant portfolio Minister for the purposes of clause 19(1)(b).
- Clause 14 of the Bill should be amended to include the following among matters to be included in an application for a project to be considered for fast-track approval:
    - identification of any of the following within the project area, regardless of whether or not these sites are also listed under a district plan: a historic place, historic area, wāhi tapu, wāhi tapu area, wāhi tūpuna, or National Historic Landmark included in the New Zealand Heritage List/Rārangi Kōrero under the HNZPTA
    - any compliance or enforcement action taken against the applicant under the HNZPTA or other relevant non-RMA legislation.
- The Bill should include consequences for an application that is false or misleading, or omits relevant information, in relation to the matters set out in clause 14, where the false, misleading or incomplete information has a significant bearing on whether the application should be approved or not.

- Clause 20 of schedule 4 should be amended to include the following among the persons that must be invited to comment on projects, in relation to approvals sought under the RMA:
    - any heritage protection authority approved under section 188 of the RMA in respect of a place that is within the project area
    - relevant non-government organisations, including organisations that advocate for historic heritage
    - Heritage New Zealand, in relation to both listed and referred projects.

Conclusion

39. PHANZA thanks the Committee for its consideration of our submission. We do not wish to make an oral submission. However, we are happy to answer any questions the Committee may have, or to see whether it is possible to organise a briefing for the Committee from our members with relevant expertise, if that would be of interest to the Committee.