

In Confidence and legal privilege required

Office of the Minister for Land Information

Chair, Cabinet Legislation Committee

Crown Pastoral Land Reform Bill: Approval for Introduction

Proposal

1. This paper proposes that the Crown Pastoral Land Reform Bill (the Bill) be approved for introduction to the House of Representatives, subject to sufficient support in the House.

2. [s 9(2)(f)(iv)]

Background

3. The Crown owns approximately 1.2 million hectares of Crown pastoral land that is perpetually leased for pastoral farming, making up five per cent of New Zealand's total land area. This land encompasses some of New Zealand's most iconic landscapes and is a taonga for New Zealanders.
4. There has been increasing public concern about the management of Crown pastoral land, including degradation of biodiversity and landscape values on current and former Crown pastoral land over time.
5. In February 2019, Land Information New Zealand (LINZ) published a review of the Crown pastoral land regulatory system. The review attributed much of this concern to unclear system outcomes, a lack of transparency and accountability, and the freeholding of Crown land through the process of tenure review.
6. In response to the public concerns and review, Cabinet decided to end the tenure review process [CAB-19-MIN-0016 refers].
7. Ending tenure review means the remaining Crown pastoral land will continue to be managed under the existing regulatory system, making it more important to address the other issues identified in the regulatory review.
8. For these reasons, Cabinet also agreed to legislative amendments to address the lack of outcomes, enhance transparency and accountability, and better reflect the Crown's obligations under the Treaty of Waitangi [CAB-19-MIN-0679 refers]. The Crown Pastoral Land Reform Bill makes these amendments.

Policy

What the Bill does

9. The Bill amends the Crown Pastoral Land Act 1998 and the Land Act 1948 to:
 - 9.1. end tenure review – a voluntary process that provides for land with significant conservation values to be removed from the lease and returned to full Crown ownership and management, and for land that has economic value to be freeholded and sold to the pastoral leaseholder
 - 9.2. implement an outcomes-based approach that considers adverse effects on inherent values (including cumulative effects) over the whole Crown pastoral land estate over time
 - 9.3. provide clearer, more transparent decision-making, stronger accountability, and more opportunity for public involvement
 - 9.4. support evolving relationships between Māori and the Crown, while recognising the relationship of Māori with their ancestral lands.

Previous decisions

10. The following policy decisions were informed by consultation on the discussion document *Enduring Stewardship of Crown Pastoral Land* between 17 February and 12 April 2019. Over 3,000 submissions were received, and a summary of these submissions can be found on LINZ's website.¹
11. Cabinet agreed to policy changes on 11 February 2019 [CAB-19-MIN-0016 refers] and on 16 December 2019 [CAB-19-MIN-0679 refers]. The main decisions related to:
 - 11.1. ending tenure review, where all reviews will cease except reviews that have reached or passed the point where the Commissioner has put a substantive proposal to the leaseholder, with the leaseholder then having three months to formally accept the proposal in writing, from the date when the proposal was put
 - 11.2. developing a clear set of outcomes for the Crown pastoral land regulatory system, as follows:
 - (a) to maintain or enhance inherent (ecological, landscape, cultural, heritage, and scientific) values across the Crown pastoral estate for present and future generations while providing for ongoing pastoral farming of Crown pastoral land
 - (b) to support the Crown in its relationships with Māori under the Treaty of Waitangi
 - (c) to enable the Crown to get a fair return on its ownership interest in pastoral land

¹ <https://www.linz.govt.nz/crown-property/crown-pastoral-land/crown-pastoral-land-management/consultation-enduring-stewardship-crown-pastoral-land/submissions-enduring-stewardship-crown-pastoral-land>

- 11.3. clarifying how advice informs decision-making – including the obligations on applicants to provide sufficient information with their application, and powers for the Commissioner to obtain advice they consider necessary to make a decision
- 11.4. providing for secondary legislation (regulations and statutory instruments) that is necessary for the administration of the Act, or for giving it full effect. Some key examples of what secondary legislation will provide for are:
 - (a) powers to create regulations setting out key aspects required to implement the legislation – for example, ensuring the terminology in the schedule and statutory test, such as ‘maintenance’ or ‘no more than minor’ adverse effect on inherent values, are clearly defined
 - (b) powers to set regulations allowing for all discretionary activity applications to be charged for on a cost recovery basis
- 11.5. improving monitoring of the overall performance of the regulatory system and the compliance of leaseholders with their obligations and consents under the Crown Pastoral Land Act 1998 and Land Act 1948
- 11.6. introducing new enforcement tools with a focus on promoting the achievement of the outcomes and providing a disincentive for non-compliant behaviour
- 11.7. strengthening the accountability on LINZ and the Commissioner through new reporting obligations
- 11.8. increasing transparency by requiring decisions on discretionary activities to be published
- 11.9. supporting the Crown in its relationships with Māori under the Treaty of Waitangi.
12. Cabinet delegated the below policy decisions to me as the Minister for Land Information, in consultation with the Minister of Agriculture and the Minister for the Environment [CAB-19-MIN-0679 refers]:
 - 12.1. developing a classification of pastoral activities as permitted, discretionary and prohibited – to be set in a schedule of the legislation – based on their possible effect on inherent values
 - 12.2. modifying the statutory process for decision-making on discretionary activities (including recreation permits, stock limitation exemptions and easements) by the Commissioner to align with the outcomes.

Targeted engagement prior to taking delegated decisions

13. Before taking final decisions on the schedule classifying pastoral activities, and the statutory process for decision-making on discretionary activities, I asked my officials to engage with leaseholder representative groups, iwi, and key stakeholders as agreed by Cabinet: the High Country Accord Trust (the Accord), Federated Farmers

(Policy), the Environmental Defence Society (EDS), Forest & Bird, and Ngāi Tahu [CAN-19-MIN-0679 refers].

14. The intent of this targeted engagement was to test the workability of the schedule classifying pastoral activities and the statutory process for decision-making on discretionary activities proposals. This engagement confirmed that these are workable.
15. Feedback from Federated Farmers and the Accord mainly focused on how existing pastoral farming activity would be treated under the proposals and wanted to see some provision for that existing activity as part of the test. They sought broader provisions for biosecurity-related activities (pest and weed control) in the permitted category of the schedule.
16. Forest & Bird and EDS raised concerns about how the cumulative effects of activities should be addressed to avoid ongoing degradation of inherent values, and wanted a less permissive statutory process.
17. Ngāi Tahu supported more protection for inherent values – particularly cultural values, mahinga kai, and ki uta ki tai (holistic, cumulative, integrated effects).
18. All stakeholders noted the need for further definition of “no more than minor” effects and detailed secondary legislation and operational policy.

Delegated decisions

19. Informed by this feedback, I have taken delegated decisions [CAB-19-MIN-0679, recommendations 9-18 refers], in consultation with the Minister of Agriculture and Minister for the Environment, as set out below:

A schedule classifying activities

19.1. The Bill will include a schedule classifying pastoral activities based on their possible effects on inherent values. This is intended to improve timeliness and efficiency, while allowing leaseholders to undertake low-impact activities that are part of day-to-day farming:

- (a) All activities are classified as discretionary unless they satisfy the criteria to be permitted or prohibited.
- (b) *Permitted pastoral activities* do not require the Commissioner’s consent, but may still require consent under other regulatory frameworks.
- (c) *Prohibited pastoral activities* cannot be approved by the Commissioner under this Act.

19.2. The Bill will include statutory criteria to be used when classifying activities now and in any future changes to the schedule. Activities may be classified as:

- (a) *permitted pastoral activities* only if the activity is needed for farming or the leaseholder's biosecurity obligations and will have a no more than minor effect on inherent values in all foreseeable circumstances
- (b) *prohibited pastoral activities* only if the activity is likely to cause significant loss of inherent values in all foreseeable circumstances.

19.3. The Bill includes a provision for the schedule classifying activities to be amended by Order in Council as agreed by Cabinet [CAB-19-MIN-0697 refers]. Before seeking a change to the schedule by Order in Council, the Minister for Land Information must consult with the Minister for Agriculture and the Minister of Conservation.

A statutory decision-making process for discretionary activities

19.4. As noted by Cabinet, the proposed changes are not intended to prevent, or reduce the amount of, pastoral farming activity happening on Crown pastoral land. Instead, the changes are intended to encourage leaseholders to undertake pastoral farming activities in a way that reduces their impact on inherent values.

19.5. The statutory decision-making process reflects this by applying a two-step process:

- (a) The application of an effects-based test where the Commissioner may approve an action with no more than minor adverse effects and a requirement to consider alternatives – intended to assess the effects of a proposed activity and ensure that Commissioner and leaseholders do everything reasonably possible to ensure that those effects are minimised. This should encourage sustainable and low-impact pastoral farming activities. The detailed provisions are set out in sections 12(3), 12(4), 13(3), and 13(4) of the Bill.
- (b) a 'pastoral farming' test to establish if there are any reasons to grant permission for an action that has a more than minor adverse effect on inherent values. This part of the test is intended to be restrictive, and to provide specific, clear circumstances in which the Commissioner can allow an activity that has more than minor adverse effects. The detailed provisions on what the Commissioner must consider and must not consider are set out in sections 12(5), 12(6), and 13(5) of the Bill.

19.6. If an activity does not pass the 'pastoral farming' test, then it must be declined by the Commissioner.

19.7. Even if an application has passed one or both tests, the Commissioner must still make a final determination before deciding whether to approve it, and is not obliged to grant permission. The relevant considerations for this determination are set out in section 11 of the Bill.

19.8. I have decided that three discretionary activities decided on by the Commissioner – recreation permits, easements, and stock limitation

exemptions – should be subject to a different or modified statutory decision-making process to pastoral farming activities because of the different nature of these activities:

- (a) *stock limitation exemptions*² are personal to the leaseholder and do not carry over with a change of ownership. This means a new leaseholder must seek a new exemption and would need to provide an application that met the full two-step statutory decision-making process. This risks introducing uncertainty to the lease transfer process which may not be consistent with the government's undertaking to not seek to reduce the amount of pastoral farming happening across the Crown pastoral estate.
- (b) I have decided that all applications for a stock limitation exemption (an exemption) – including the Commissioner exercising their ability to revoke or vary an exemption – will be subject to the statutory decision-making process set out above, with a single modification to address uncertainty around lease transfers. In instances where (i) a lease is being transferred, and (ii) the exemption applied for by the new leaseholder is not greater than the exemption which the old leaseholder held, the Commissioner may decide whether to grant the exemption by considering the leaseholder's farming ability and whether the land can support the number of stock (see section 16(3) of the Bill).
- (c) *Recreation permits*³ do not necessarily contribute to ongoing pastoral farming, and it would therefore be difficult to make a case for a recreation permit under the second part of the test as it currently stands.
- (d) I have decided all applications for recreation permits will be considered using the first part of the statutory decision-making process. This will mean the Commissioner can approve only those recreational activities with a no more than minor adverse effect on inherent values. In cases where an application is made to continue existing activity, the Commissioner may make a further consideration on whether the action is required to enable use of consented existing infrastructure or buildings (see section 13(5) of the Bill) to provide for instances of significant investment in non-portable infrastructure that provides a broader benefit (e.g. skifields), while still applying the test to ensure the activity is carried out with the lowest impact possible.

² Pastoral leases have a stock limitation that was set around 1948, when the land was in its largely undeveloped state. A stock limitation exemption allows the leaseholder to carry more stock than the number set out in the lease. A stock limitation exemption is personal to the leaseholder and does not carry over with a change of ownership.

³ Recreation permits allow leaseholders (or third parties with leaseholder approval) to undertake certain non-pastoral activities - recreational, tourist, accommodation, safari, and other activities per section 66A of the Land Act 1948 - on their land.

- (e) *Easements*⁴ do not necessarily contribute to ongoing pastoral farming, and it would therefore be difficult to make a case for one under the second part of the test as it currently stands. Only applying the first part of the test could be unduly restrictive, as an easement may have more than minor impacts on inherent values, but may have broader benefits that would not be captured in the test – for example infrastructure provision such as pipelines or electricity transmission networks.
- (f) I have decided that, when deciding to grant an easement on Crown pastoral land, the Commissioner will only consider the broad outcomes of the Act and whether creating the easement over Crown pastoral land is reasonably necessary for achieving the objectives of the applicant (see part 2, section 20 of the Bill).

20. Cabinet also authorised the Minister for Land Information to make technical policy decisions, provided they do not materially change the policy intent of proposals [CAB-19-MIN-0679 paragraph 42 refers]. I have made the following technical decision:

- 20.1. using an infringement notice, instead of an administrative penalty, in cases where leaseholders have undertaken activities requiring a consent without applying for that consent. This change is based on advice provided to us by the Legislation Design and Advisory Committee (LDAC) and the Ministry of Justice. An infringement notice achieves the same policy intent, but also provides the leaseholder with an independent right of appeal and review rights as set out in the Summary Proceedings Act 1957 and the Summary Proceedings Regulations 1958.

Contentious aspects

21. Certain aspects of the Bill may be contentious:

- 21.1. there may be debate over the outcomes set out in section 4 of the Bill. Stakeholders will likely focus on how the Bill weights the considerations of inherent values of the land while providing for ongoing pastoral activity.
- 21.2. the design of the statutory decision-making process (sections 11-13) and classification of activities in a schedule (schedule 1AB) will play a critical part in achieving the outcomes of the legislation. Stakeholders – both leaseholders and ENGOs – will likely focus on the intent and detailed wording of these sections of the Bill.

22. Although officials undertook considerable consultation with iwi and stakeholders on the above issues, I anticipate that these issues may be raised by leaseholders, iwi and stakeholders through the Select Committee process.

⁴ Easements provide a legal right-of-way over or under the pastoral land, and may be granted in favour of the Crown or another third-party. They are not typically applied for by leaseholders but are often required for infrastructure. Easements do not require the leaseholder's approval, but leaseholders are entitled to compensation, as is the Crown.

Impact analysis

23. A Regulatory Impact Assessment (RIA) was prepared and provided to Cabinet at the time that policy approval was sought (on 16 December 2019), following review by a Quality Assurance Panel, with representatives from LINZ and the Treasury Regulatory Quality Team [CAB-19-MIN-0679 refers]. The review team considered that the RIA partially met the Quality Assurance criteria.
24. In regard to the decision to end tenure review, a RIA was prepared and provided to Cabinet at the time that policy approval was sought (on 11 February 2019), following review by an independent expert within LINZ [CBC-19-MIN-0001 & CAB-19-MIN-0016 refers]. The reviewer considered that the RIA partially met the Quality Assurance criteria.

Compliance

25. The Bill complies with each of the following:
 - 25.1. the principles of the Treaty of Waitangi
 - 25.2. the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993
 - 25.3. the disclosure statement requirement
 - 25.4. the principles and guidelines set out in the Privacy Act 1993
 - 25.5. relevant international standards and obligations.
26. The Ministry of Justice will provide advice to the Attorney-General on the compatibility of the Bill with the New Zealand Bill of Rights Act 1990. If the Attorney General chooses to waive legal privilege to this advice, it will be published on the Ministry of Justice website at: <https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/bill-of-rights-compliance-reports/>
27. LDAC has been consulted throughout the design of the policy proposals and the drafting of the Bill.

Consultation

28. This paper has been distributed to all relevant departments and departmental agencies: the Department of Conservation, the Ministry for the Environment, the Ministry for Primary Industries, Te Arawhiti, the Department of the Prime Minister and Cabinet, the Ministry of Business, Innovation and Employment (Tourism), the Ministry for Culture and Heritage, Te Puni Kōkiri, the New Zealand Defence Force, the Ministry of Justice, the State Services Commission, and The Treasury.
29. In addition to the targeted engagement with stakeholders on the delegated decisions, officials worked closely with officials from the Department of Conservation and Ministry for Primary Industries, with assistance from Ministry for the Environment, to provide advice on:

- 29.1. clear terminology to aid with interpretation and clarity of drafting
- 29.2. ensuring the schedule classifying activities and the statutory decision-making test translate the outcomes into specific statutory decisions, including forming the relevant considerations.

30. The Government caucus has been consulted.

Department of Conservation comment

31. DOC considers that the reforms will positively reset the administration and management of Crown Pastoral land to allow inherent values on Crown pastoral land to be maintained or enhanced, while providing for ongoing pastoral farming of pastoral land. DOC is committed to working with LINZ to support the Commissioner of Crown Lands in his role in Crown Pastoral lease administration. In order to achieve the outcome that the Bill intends on the ground, working in partnership with LINZ and iwi, DOC will also endeavour to inform management decisions by leaseholders to reduce adverse effects from current and future activities.

Iwi and stakeholder consultation

32. The relevant industry groups (The High Country Accord Trust and Federated Farmers Policy), the Environmental Defence Society, Forest & Bird, and Ngāi Tahu were consulted on the delegated decisions regarding the schedule classifying pastoral activities, and the statutory process for decision-making on discretionary activities.

Binding on the Crown

33. The Bill amends the existing Crown Pastoral Land Act 1998 and Land Act 1948, both of which are already binding on the Crown [CAB-19-MIN-0016 and CAB-19-MIN-0679 refers].
34. The Bill does not propose to create a new agency.

Allocation of decision-making powers

35. The Bill does not affect the allocation of decision-making powers between the executive, the courts and the tribunals.

Associated regulations

36. The Bill provides for regulations to be made by Order in Council, on the recommendation of the Minister, for the following purposes:
 - 36.1. prescribing the information required to be provided with an application for consent to undertake a discretionary pastoral activity (for example the description and location of the activity, the inherent values impacted, and mitigation)
 - 36.2. matters the Commissioner must take into account in deciding the level of adverse effects of a proposed activity on inherent values

- 36.3. prescribing fees or charges payable for applications for consent to undertake discretionary pastoral activities
 - 36.4. prescribing the information that must be contained in or accompany an enforceable undertaking under section 100B
 - 36.5. prescribing infringement offences for the contravention of regulations made under this Act
 - 36.6. prescribing penalties for infringement offences against this Act or regulations made under this Act
 - 36.7. prescribing the form of infringement notices and infringement offence reminder notices
 - 36.8. requiring persons to collect information and supply information to the Chief Executive or the Commissioner for the purposes of this Act
 - 36.9. making provisions, not inconsistent with this Act, that set out decision-making processes or otherwise provide for the administration of pastoral land under this Act
 - 36.10. providing for any other matters contemplated by this Act, necessary for its administration, or necessary for giving it full effect.
37. The Bill outlines that the Minister must not recommend the making of regulations listed above unless satisfied that the chief executive or the Commissioner has consulted relevant iwi, leaseholders, licensees, and the public on the development of the regulations.
38. The Bill also provides for Orders in Council, on recommendation of the Minister for Land Information in consultation with the Minister of Agriculture and the Minister of Conservation, to amend, replace or delete any of the items in the schedule of classified activities (Schedule 1AB) as set out in section 100L.

Regulations needed to bring the Bill into operation

39. Regulations relating to the exercise of the Commissioner's decision-making on discretionary activities (including recreation permits, easements, and stock limitation exemptions) will be needed to bring the Bill into operation. This includes:
- 39.1. the information that must be required with an application for a discretionary activity
 - 39.2. matters the Commissioner must take into account when determining the level of adverse effects of the proposed activity on inherent values (e.g. 'no more than minor') including addressing temporary adverse effects
 - 39.3. regulations defining 'maintenance' of an activity as part of an ongoing programme.

Other instruments

40. The Bill includes the following provisions empowering the making of other instruments that are deemed to be legislative instruments or disallowable instruments (or both). The reasons for these instruments are set out in the explanatory note of the Bill.
41. Empowering provisions for both the Chief Executive and Commissioner are provided as follows:
 - 41.1. The Chief Executive, in line with their responsibility for administering the act, may set standards and issue directives in relation to the framework for determining applications for discretionary pastoral consents or recreation permits – see section 100O(2).
 - 41.2. The Commissioner, who is charged with applying the Act, may set standards and issue directives in relation to the administration of Crown pastoral land and its inherent values – including monitoring the state of the land – and compliance by holders of reviewable instruments with requirements of the Act – see section 100O(1)(a).

Definition of Minister/department

42. 'The Chief Executive' in the Bill is defined as the Chief Executive of the department responsible for administering the Crown Pastoral Land Act 1998 and the Land Act 1948 – which is Land Information New Zealand.

Commencement of legislation

43. The Bill will come into force on the day after the date of Royal assent.

Parliamentary stages

44. [s 9(2)(f)(iv)]

45. I intend to move that the Bill be referred to the Environment Committee.

Proactive Release

46. I propose to proactively release this paper after introduction of the Bill to Parliament, subject to any redactions in accordance with proactive release guidelines and redacting any legally privileged content.

Recommendations

The Minister for Land Information recommends that the Committee:

1. [s 9(2)(f)(iv)]

2. **note** that the Bill amends the Crown Pastoral Land Act 1998 and the Land Act 1948 to:
 - 2.1. end tenure review – a voluntary process that provides for land with significant conservation values to be removed from the lease and returned to full Crown ownership and management, and for land which has economic value to be freeholded and sold to the pastoral leaseholder
 - 2.2. implement an outcomes-based approach that considers cumulative effects on the whole Crown pastoral land estate over time in place of the current process-based approach that delivers discrete decisions and actions
 - 2.3. provide clearer, more transparent decision-making, stronger accountability, and more opportunity for public and leaseholder involvement
 - 2.4. support evolving relationships between Māori and the Crown while recognising the relationship of Māori with their ancestral lands.
3. **note** that the Bill as drafted reflects Cabinet policy decisions [CAB-19-MIN-0016 and CAB-19-MIN-0679 refer] including delegated and technical decisions by the Minister for Land Information as authorised by Cabinet [CAB-19-MIN-0679 refers]
4. **approve** the Crown Pastoral Land Reform Bill for introduction, subject to sufficient support in the House of Representatives
5. **agree** that the Bill be introduced as soon as possible
6. **agree** that the Government propose that the Bill be referred to the Environment Committee by 6 August 2020, for consideration by Select Committee for up to six months.

Authorised for lodgement
Hon Eugenie Sage
Minister for Land Information