

BRF 22-128 Crown Pastoral Land Reform Bill: Supplementary Order Paper

Ki / To: Minister for Land Information

Rā / Date: 11 November 2021

Ngā mahi e hiahiatia ana / Action Sought

Minita/Minister	Hohenga/Action	Rā Mutunga/Deadline
Minister for Land Information	Approve the attached Government Supplementary Order Paper, which makes minor and technical amendments to the Crown Pastoral Land Reform Bill.	15 November 2021

LINZ Whakapā / LINZ Contacts

Ingoa/Name	Tūnga/Position	Nama waea/ Contact number	Whakapā tuatahi/ First contact
Simon Skews-Poole	Manager, Crown Land and Information Policy	04 460 0166	<input type="checkbox"/>
Laurence Tyler	Senior Policy Advisor	04 460 0294	<input checked="" type="checkbox"/>

Te Tari o te Minita ki te Whakaotī / Minister's office to complete

Kounga/ Quality	<input type="checkbox"/> 1 Unsatisfactory	<input type="checkbox"/> 2 Fell short of expectations	<input type="checkbox"/> 3 Met expectations	<input type="checkbox"/> 4 Exceeded expectations	<input type="checkbox"/> 5 Greatly exceeded expectations
--------------------	--	--	--	---	---

Poto kōrero/
Comments

Pūtake/Purpose statement

To seek your approval for the Parliamentary Counsel Office (PCO) to finalise the attached Government Supplementary Order Paper (SOP), which makes minor and technical amendments to the Crown Pastoral Land Reform Bill (the Bill).

Pānui whāinga/Key messages

1. Toitū Te Whenua LINZ (LINZ) has identified that an SOP is required to make some minor and technical amendments to the Bill.
2. The amendments:
 - refine the provision in the Bill intended to promote public access to Crown pastoral lease land on a reasonable basis (clause 21A(3)), in order to more effectively take into account the property rights of leaseholders¹
 - make other technical amendments to correct drafting errors, clarify terminology and update references in the Bill to other statutes.
3. The amendments to the public access provision have been included in the Government SOP in response to concerns raised by the High Country Accord Trust (the Accord) about the impact of the current access provision in the Bill on leaseholders' property rights.
4. LINZ has consulted the Accord on its proposed changes to the access provision. The Accord considers that a range of amendments should be made to further limit the provision, which are summarised in **Table 1** of this briefing. LINZ does not consider these amendments to be warranted, on the basis that the wording in the Government SOP strikes an appropriate balance between promoting reasonable public access onto lease land and respecting leaseholders' property rights.
5. Subject to your agreement, PCO will finalise the Government SOP for you to release to Members. LINZ understands that the Committee of the whole stage for the Bill may now not take place until early next year. We will provide your Office with advice on the appropriate process and timing for the release of the SOP shortly.

Tohutohu/Recommendations

It is recommended that you:

1. **note** that the attached Government SOP (**Attachment 1**) makes minor and technical amendments to the Bill – these amendments:
 - 1.1 refine the provision in the Bill relating to public access (clause 21A(3)) to more effectively take into account leaseholders' property rights

¹ 'Leaseholder' is used throughout this report to refer to both leaseholders and licence holders in relation to Crown pastoral land.

- 1.2 correct drafting errors, clarify terminology and update references in the Bill to other statutes *Noted*
2. **note** that, as summarised in **Table 1** of this briefing:
- 2.1 the Accord considers that a range of additional amendments should be made to further limit the public access provision in the Government SOP
- 2.2 LINZ does not consider these amendments to be warranted *Noted*
3. **agree** that the Accord's proposed amendments to the access provision, summarised in **Table 1**, not be included in the Government SOP *Agree / disagree*
4. **approve** the attached Government SOP, subject to any minor editorial changes that may be made by PCO *Agree / disagree*
5. **note** that, subject to your approval above, PCO will finalise the Government SOP. *Noted*



Simon Skews-Poole

Manager, Crown Land and Information Policy, Toitū Te Whenua LINZ

Rā/date: 12/11/2021

Hon Damien O'Connor

Te Minita mō Toitū te Whenua / Minister for Land Information

Rā/date:

Tāpiritanga/Attachments

- Attachment 1 – Draft Supplementary Order Paper

Te Horopaki/Background

The Bill is currently progressing through the House.

1. Since the Environment Committee reported the Bill back to the House on 6 July 2021, LINZ has identified and discussed with you the need for an SOP to address some minor and technical issues.
2. The Government SOP would need to be introduced prior to the Committee of the whole House stage of the Bill. LINZ understands that the Committee of the whole stage may now not take place until early next year.
3. The proposed Government SOP is attached to this briefing for your consideration (**Attachment 1**).
4. The proposed Government SOP contains two elements:
 - i) refinement of the provision intended to promote public access to Crown pastoral land on a reasonable basis at the time a lease is transferred
 - ii) other minor and technical changes.
5. These two elements are addressed in the following sections of this briefing.

i) Consideration of public access

The Bill currently contains a provision regarding the consideration of public access at the time of lease transfer

6. Public submissions on the Bill at the Select Committee stage highlighted the value and importance of public access to Crown pastoral land for recreational purposes.
7. Accordingly, LINZ's departmental report on the Bill recommended that a provision be added to the Bill to support increased public access to Crown pastoral land on a reasonable basis, while respecting leaseholders' property rights.
8. The departmental report recommended that the provision should apply at the time of lease transfer – this reflects that, under the *Land Act 1948*, the Commissioner can, in the public interest, grant consent to a lease transfer subject to such conditions they see fit, which could include conditions around access.
9. In response to the recommendation in LINZ's departmental report, the majority of the Environment Committee agreed that the following provision be inserted in the Bill:

clause 21A(3) of the Bill – Section 89 of the *Land Act 1948* is amended by inserting new subsection (2A):

If the land under the lease or licence is pastoral land, the Commissioner must not consent to the transfer, sublease, or other disposal unless satisfied

that the applicant has made reasonable endeavours to enhance public access to the land.

Leaseholders strongly oppose the current access provision in the Bill

10. The Accord has since indicated strong opposition to the new access provision. It considers the provision would significantly diminish the property rights granted by the Crown to leaseholders under the pastoral lease – to exclusive occupation and quiet enjoyment of the lease land – and thereby also affect the value of leases, without consultation or compensation, and would have a compounding effect.

[s 9(2)(h)]

11. [s 9(2)(h)]

You requested advice on whether this provision could be amended to better reflect its intent

12. On 2 August 2021, you asked LINZ to carry out further work to ensure the provision more effectively reflects its original intent – namely to promote public access over Crown pastoral lease land on a reasonable basis, while respecting leaseholders' rights.
13. On 27 October and 10 November 2021, LINZ discussed with you its proposed approach to meet this aim [BRF 22-142 refers].
14. LINZ proposes that the scope of the access provision be refined to focus specifically on cases where leaseholders have unreasonably refused requests for public access over Crown pastoral lease land in the past:
 - In these cases, the Commissioner would be able to require, when such leases are being transferred², that the outgoing leaseholder and incoming leaseholder enter *negotiations* with the Commissioner aimed at ensuring that similar access requests will not be unreasonably refused in future. If this negotiation process does not satisfactorily resolve the access issue, the matter could then be referred to mediation.
 - Powers set out in the Bill would provide for the Commissioner to set a standard or directive specifying the detail of how the access provision would apply.³ The standard or directive could set out the steps the Commissioner would need to take, and include details such as who the Commissioner must consult, and what happens if negotiations require mediation.⁴

² The provision would also apply in cases where leases are subleased, though this is relatively rare.

³ These powers are specified in new section 1000 of the Bill, which comes into effect six months after Royal assent for the Bill.

⁴ LINZ expects the use of mediation would be relatively rare, and would be met within LINZ's baseline funding, out of the *Crown Land Multi-Category Appropriation*.

15. The draft of the provision setting out the necessary powers to facilitate this approach, for inclusion in the Government SOP, is set out below, with the key elements highlighted:

(3) After section 89(2), insert:

- 2A *Without limiting anything in subsection (2), when the Commissioner is considering whether to consent to the transfer or sublease of pastoral land, the Commissioner must consider whether requests for public access over the land have been unreasonably refused by the lessee or licensee in the past.*
- 2B *If the Commissioner considers that access has been unreasonably refused, they may make their consent to the transfer or sublease subject to the condition that the lessee or licensee, and the potential transferee or sublessee, must enter into a negotiation process with the Commissioner with the intention that access requests will not be unreasonably refused after the transfer or subleasing.*
- 2C *Any matters necessary to give full effect to the steps set out in subsections (2A) and (2B) may be prescribed in a standard or directive set or issued by the Commissioner under section 1000(1) of the Crown Pastoral Land Act 1998.*

The standard or directive could set out the detail of how the access provision would be applied

16. At this stage, LINZ envisages that the standard or directive would require the Commissioner to consult with the New Zealand Walking Access Commission (WAC) and the Department of Conservation (DOC) – and any other entities and/or individuals the Commissioner considers appropriate, depending on the circumstances (e.g. the local Fish & Game Council or mana whenua) – at the time of lease transfer or subleasing, to identify if there have been any complaints about access being unreasonably denied over the history of the current leaseholder's holding of the lease.
17. If the Commissioner considers that there had been an unreasonable denial of access, and nothing has since been done to remedy this situation, the Commissioner could then engage with the current leaseholder and the transferee/sublessee to seek their support for a resolution through negotiations and, if necessary, mediation.
18. LINZ does not propose that the standard or directive would *require* the leaseholder to provide access, if negotiation or mediation is unable to resolve the issue.
19. However, if the incoming leaseholder does not support a resolution, they would effectively be on notice, from that point onwards, that access may again be an issue for them (and any potential purchaser of the lease) when they wish to transfer the lease in the future.

20. The development of the standard or directive would require engagement with DOC, WAC, leaseholders and iwi, and public consultation.⁵
21. Further detail could, if necessary, be specified in a protocol agreed with leaseholders, which would be a non-statutory instrument. Such a protocol could potentially set out issues for the Commissioner to take into account – including cases where it may be reasonable for a leaseholder to refuse or limit access. This could include where access requests could potentially conflict with farm management activities such as lambing or mustering; or requests to bring animals or motorised vehicles onto the land. A protocol could also provide guidance to leaseholders to support them to manage requests for access as they arise.

[s 9(2)(h)]

22. [s 9(2)(h)]

Consultation on the proposed access approach

LINZ has engaged with other agencies and interest groups on the proposed approach

23. LINZ developed the proposed amendment regarding public access in consultation with DOC, WAC, PCO and Crown Law.

DOC and WAC have indicated they would support the development and operation of the proposed approach

24. As previously discussed with you on 27 October 2021, WAC and DOC have expressed concern at what they see as the extremely limited scope of the proposed access provision and its functionality [BRF 22-142 refers].
25. However, WAC and DOC have also indicated that they would be willing to work with LINZ, leaseholders, iwi and other groups on the development of the standard or directive to underpin the access provision in the Bill, and on a possible protocol to set out further guidance on how the provision would be applied.
26. WAC and DOC have also indicated they would be willing to be involved in providing input to support the Commissioner's decision-making process when the proposed access provision is applied in practice, subject to further detail being established regarding the standard or directive.

The Accord considers the proposed provision should be more restricted

27. LINZ has consulted the Accord on its proposed changes to the access provision, for inclusion in the Government SOP.

⁵ The consultation requirements for standards or directives are set out under new section 100O of the Bill. The power for the Commissioner to set standards or directives will come into effect six months after Royal assent for the Bill.

28. The Accord continues to consider it would be more appropriate for matters of access onto Crown pastoral land to be resolved informally.⁶ Its feedback to date though indicates LINZ's proposed approach does not raise the same degree of concern with them, in relation to leaseholders' property rights, that the current access provision in the Bill does.
29. However, LINZ understands the Accord considers that the proposed provision for the Government SOP should be more restricted in several respects, in order to prevent the undermining of the right of exclusive possession and potential disruption to pastoral farming. As discussed with you on 27 October and 10 November 2021, LINZ does not consider the additional restrictions sought by the Accord to be warranted, in view of the Government's intention to balance the value and importance of public access to Crown pastoral land with leaseholders' property rights.
30. A summary of the Accord's views and LINZ's comments on them is set out in **Table 1** below:

Accord's view	LINZ comment
<p>The provision in the Government SOP should:</p> <ul style="list-style-type: none"> • only apply to walking access, and should exclude other forms of access, due to degree of disruption such activities would cause • only apply to members of the public and not groups - i.e. refusals of access for recreation groups should not trigger the provision • only apply to access across Crown pastoral lease land (to other land) and not onto it • not be triggered when the lease is transferred through inheritance rather than sale. 	<ul style="list-style-type: none"> • Limiting the provision to walking access would exclude other forms of access, such as access for mountain bikes, that may be legitimate and reasonable in certain circumstances. Certain activities such as bringing motorised vehicles onto lease land would not typically be considered reasonable due to the degree of disruption they would cause. LINZ considers these issues could be addressed in the proposed standard/directive, or in a non-statutory protocol (as outlined on the previous page). • The provision should be able to be triggered by complaints from groups (e.g. recreation groups) as well as members of the public, given these groups comprise members of the public. • In some cases there may be a legitimate case for the public to have access onto lease land rather than just through it – e.g. people may wish to enter the property to fish a stream or to access iconic inherent values. • LINZ does not consider such an exception would be warranted, as a transfer due to inheritance would provide a legitimate opportunity for the Commissioner to consider public access.

⁶ The Accord considers this approach could be supported by Clause 19(1) of the Bill, which amends the *Land Act 1948* to provide that the Commissioner can support WAC in meeting its public access objective in relation to Crown pastoral land.

31. Accordingly, LINZ recommends that the Accord's proposed amendments summarised in **Table 1** above not be included in the access provision in the Government SOP.

Some recreation and environmental NGOs favour a stronger access provision

32. To date, LINZ's consultation on the access proposal outlined in paragraphs 14-21 of this briefing has only been with the Accord, given that the focus of this work has been on addressing issues raised specifically in relation to leaseholders' property rights.
33. However, on 12 August 2021, you met with the High Country Advisory Group (HCAG)⁷ and notified them of the Government's intention to amend the access provision in the Bill to better take account of leaseholders' rights.
34. Subsequently, on 6 September 2021, Fish & Game New Zealand, the Environmental Defence Society, Forest & Bird, and Federated Mountain Clubs wrote to you proposing their own amendment to the access provision currently in the Bill. They proposed an alternative SOP. A key element of this alternative SOP specifies that leaseholders could not unreasonably withhold requests for access, but that leaseholders could make access subject to reasonable conditions.
35. LINZ considers that such an amendment would exacerbate the issues regarding leaseholders' property rights that arise with the current access provision in the Bill. For example, as already noted, under the *Land Act 1948*, the appropriate time for the Commissioner to make conditions with respect to access is at the time of lease transfer, and there are distinct limits to how far such a provision can go in view of leaseholders' property rights.
36. On 27 October 2021, based on LINZ's advice, you agreed that the above proposed amendments proposed by these groups not be included in the Bill.

ii) Other minor and technical amendments for inclusion in the Government SOP

37. Subject to your agreement, LINZ proposes that the Government SOP include some additional minor and technical amendments that will:
 - correct a drafting error in new section 100B(1) of the Bill, in order to ensure that enforceable undertakings can apply to third parties who breach the terms of a commercial recreation permit that they hold⁸ – this is already envisaged in new section 100B(1)(b), and is in accordance with the original policy intent

⁷ HCAG includes representatives of recreation and environmental NGOs, such as the New Zealand Fish & Game Council, the Environmental Defence Society, Forest & Bird, as well as other groups such as Te Rūnanga o Ngāi Tahu, Federated Farmers and the Accord.

⁸ In some cases, the holder of a commercial recreation permit will be a different legal entity to the leaseholder, either a related but separate company or as a completely unrelated third party (e.g. a guided tour operator).

- as a result of the above correction, to ensure consistency in terminology, replace the term "holder" with "person", and make associated wording changes, in new sections 100A, 100B and 100C
- correct a drafting error in new sections 12 and 13 of the Bill, to ensure that decision-making criteria for discretionary pastoral consents and commercial recreation permits take appropriate account of any actions to avoid, remedy or mitigate adverse effects on inherent values – this drafting error arose when these sections were reordered at the Select Committee stage
- clarify that exemptions from stock limitations are covered by certain provisions that generally relate to discretionary pastoral consents – including the following:
 - confirm that applications for stock limit exemptions are covered under the regulation-making provisions for information requirements, deciding adverse effects, and prescribing fees or charges (new section 100N(1)(a), (b) and (c))
 - ensure that permission under other enactments (such as the *Resource Management Act 1991*) are still required, where applicable, when stock limitation exemptions are granted (new section 21)
 - ensure standards or directives made by the LINZ Chief Executive can include standards or directives for stock limitation exemptions (new section 100O(2))
 - confirm that the transitional provision for existing consented activities include stock limitation exemptions (New Schedule 1AA, Part 1, 4C)
- update certain references in the Bill to reflect the repeal and replacement of certain other legislation, including:
 - defining "Surveyor-General" by reference to the definition of that term in section 4 of the *Cadastral Survey Act 2002*
 - updating cross-references to the "Chief Surveyor" and the *State Sector Act 1988*
 - deleting transitional provisions relating to the *Legislation Act 2019* that are no longer necessary (New Schedule 1AA, Part 2)
- make other minor technical drafting corrections, including in relation to new section 6(2)(b) and new section 13(2).

38. The above amendments are highlighted in the attached copy of the Government SOP.

You have also agreed that a range of other changes to the Bill sought by the Accord should not be included in the Government SOP

39. On 29 October 2021, the Accord sent to LINZ an alternative SOP it has drafted, which contains a range of other amendments not relating to public access, that it considers should be included in the Bill. The Accord's proposed SOP comprised two main elements:
- Proposed amendments relating to issues already considered by the Government and the Environment Committee. These proposed amendments would be contrary to policy decisions previously made by the Government in relation to the Bill.
 - Amendments that set out in more detail certain activities already listed in the schedule of permitted pastoral activities in the Bill – e.g. more detailed provisions on maintaining existing seed sowing activities, and on maintaining existing roads paths or tracks. LINZ considers it would be more appropriate for these matters to be worked through as part of the development of subsidiary instruments that will be required to enable the provision to be implemented, once the Bill has passed.
40. On 10 November 2021, based on LINZ's advice, you agreed that the above proposed amendments not be included in the Bill, but that LINZ would work with the Accord on the proposed standards or directives, and on any guidance for leaseholders to ensure that where appropriate, certain of these issues (such as clarifying whether seed sowing includes direct drilling) are addressed [BRF 22-155 refers].

Risks

41. If the proposed access provision outlined in this briefing is included in the Government SOP, LINZ expects that:
- the access provision will be opposed to some degree by the Accord, as it will continue to consider that the provision should be more restricted, along the lines summarised in **Table 1** above
 - some environmental and recreational groups are likely to view the access provision as too limited in its scope and coverage.
42. The above parties could therefore be expected to make further various representations to the Government and/or media statements on this once the Government SOP is tabled in the House.
43. However, LINZ considers that any criticism of the access provision from these parties could be managed on the basis that the proposed provision strikes an appropriate balance between promoting reasonable access onto lease land on the one hand, while respecting leaseholders' property rights. To that extent, the provision accommodates the interests of both sides to the most feasible extent possible.

44. Subject to your agreement that the proposed access provision is included in the Government SOP, LINZ intends to consult closely with all the above parties on an ongoing basis on the development of the proposed standard or directive and any other instruments necessary to bring the provision into effect. LINZ will work closely with these groups in order to take into account their views, as appropriate, as part of this development work.
45. It is likely that the Accord will continue to press for the range of other amendments outlined in paragraph 39 above, not related to access, for inclusion in an SOP. LINZ considers any ongoing representations from the Accord on these matters can be managed on the basis of LINZ's position on these matters, as outlined in paragraphs 39 and 40.

Ngā Tāwhaitanga/Next Steps

46. PCO has advised that all amendments proposed in the attached Government SOP are minor and technical improvements, so the SOP does not require Cabinet approval.
47. As part of your second reading speech, you have already notified the House that you intend to table a Government SOP for the Bill, to address the access issue.
48. Subject to your approval to the above proposals, PCO will finalise the Government SOP and arrange for it to be lodged with the House Office for you to release it to Members and the public, prior to its consideration at the Committee of the whole House stage.
49. LINZ understands that the Committee of the whole House stage for the Bill may now not take place until early next year. We will provide your Office with advice on the appropriate process and timing for the release of the SOP shortly.

Proactive Release