New Zealand Law Society
Te Kāhui Ture o Aotearoa

Crown Pastoral Land Reform Bill

27/11/2020

Submission on the Crown Pastoral Land Reform Bill

1 Introduction

1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Crown Pastoral Land Reform Bill (**Bill**). The Bill amends the Crown Pastoral Land Act 1998 (**Act**) and the Land Act 1948. The Bill ends tenure review and redesigns the legal framework with the intention of improving Crown pastoral land outcomes.

1.2 This submission recommends some drafting amendments to improve the clarity and workability of the Bill.

1.3 The submission has also identified aspects of the Bill that raise important issues relating to property rights, consultation and retrospectivity (discussed at [10] and [11] below), which deserve further consideration before the legislation proceeds.

1.4 The Law Society does not seek to be heard but is available to assist the select committee or officials on drafting and technical issues if that would be helpful.

2 Clause 5: new section 1A – Purpose

2.1 Clause 5 inserts a purpose section (new section 1A) in the Act. The (amended) Act is to:

> *(a) provide for the administration of pastoral land; and*
>
> *(b) state the outcomes that persons who make decisions under this Act and relevant provisions of the Land Act 1948 are to seek to achieve.*

2.2 As currently drafted, new section 1A merely describes the content of the Act. In the Law Society's view, it does not provide the necessary guidance to users in the interpretation and application of the amended Act.[1] Purpose clauses are used in legislation for a number of reasons, including:[2]

- communication reasons – to make the basic purpose of a regime clear to a reader before they get into the detailed provisions, so as to help them understand and apply the legislation,
- interpretative reasons – to guide the interpretation of the legislation,
- signalling reasons – to set the direction of a regime and often to signal a change in the high-level policy approach.

2.3 The new purpose section could be usefully reframed to guide interpretation of the Act and to make the basic purpose of the new regime clearer to users – for example, by replacing limb (a) with the wording used in the explanatory note to the Bill:

> "*To provide for the administration of pastoral land in a manner that maintains or enhances its ecological, landscape, cultural, heritage, and scientific values for present and future generations, while providing for ongoing pastoral farming of the land*."

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1 Section 5(1) of the Interpretation Act 1999 states the meaning of an enactment must be ascertained from its text and in the light of its purpose.

2 Legislation Design and Advisory Committee, *Supplementary Materials to the Legislation Guidelines* (2018 edition) – Designing purpose provisions and statements of principles.

Recommendation

2.4 Consider amending section 1A(a) to more accurately convey the fundamental purpose of the new regime, to assist with interpretation of the Act.

3 Clause 6: amended section 2 – "inherent value"

3.1 The new definition of "*inherent value"* inserted by clause 6 retains the existing reference to the "*conformation"* of the land. This terminology is unusual, if not archaic, and a plain English alternative could be considered – such as "*characteristics*" or "*natural character of the land*".[3]

Recommendation

3.2 In the definition of *inherent value*, consider alternative wording for "*conformation"*, such as "*characteristics" or "natural character"*.

4 Clause 8: new section 4 – Outcomes for decision-makers

"seek to achieve"

4.1 Clause 8 replaces the entire Part 1 of the Act. New section 4 sets out outcomes for decision-makers and now requires that they "*seek to achieve"* the three outcomes listed in section 4(1).

4.2 The wording "seek to achieve" is unusual in a legislative context. As the Bill's Digest notes,[4] it might be considered ambiguous, and it is not clear what steps would be required to satisfy such a test. The Law Society suggests the committee seeks advice from officials about whether alternative wording might provide greater clarity for statutory decision-makers.

"supporting the Crown"

4.3 One of the outcomes sought to be achieved is "*supporting the Crown in its relationships with Māori under te Tiriti o Waitangi"* (new section 4(1)(b)). The nature and circumstances in which such support might be provided are unclear. It could be read, for instance, to require support for Crown actions that are contrary to the principles of te Tiriti o Waitangi. This objective could usefully be reframed to clarify why and how decision-makers are to "support" the Crown (for example, by assisting in consultation with Māori on matters relevant to Crown pastoral leases and the land they cover). The Law Society suggests that an alternative formulation, based on other recent statutory references to the Crown's obligations to Māori,[5] would be "recognising and respecting the Crown's responsibility to consider and provide for Māori interests, as provided in section 5".

Recommendation

4.4 Consider alternative wording for "seek to achieve" in new section 4(1).

4.5 Amend new section 4(1)(b) to read "recognising and respecting the Crown's responsibility to consider and provide for Māori interests, as provided in section 5".

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3 "Natural character of the land" is the terminology used in the Resource Management Act 1991, s6.

4 Bills Digest 2629, at 'Outcomes': if an outcome is ultimately not achieved despite some effort, will that satisfy section 4?

5 See for example similar wording in Taumata Arowai – the Water Services Regulator Act 2020, s5 "In order to recognise and respect the Crown's responsibility to consider and provide for Māori interests, ...", and Kāinga Ora Act 2019, s4.

5 New section 6 – Classification of pastoral activities on pastoral land

5.1 The wording of new section 6(1)(b) is currently unclear. It appears the intention is that all pastoral activities other than those that are specifically permitted or prohibited, require the consent of the Commissioner before they can be undertaken. If that is the intention, it should be clearly stated.

Recommendation

5.2 Reframe new section 6(1)(b) to clearly state that pastoral activities described in sections 7 to 9, which are not classified as either a permitted pastoral activity or a prohibited pastoral activity, will require the consent of the Commissioner.

6 New section 11 – Process for Commissioner's decision

6.1 New section 11(3)(b) requires the Commissioner to consider "*current Government policy"* but provides no guidance as to how such policy might be identified, and with what level of formality. As currently framed, it could permit ad hoc direction from the Minister of Land Information, which would compromise the integrity of the process.

Recommendation

6.2 Amend new section 11(3)(b) to refer to current Government policy as reflected, for instance, in a Cabinet resolution. Alternatively, the Act could specifically provide for a process for the issue of policy statements by the Minister for the purposes of the Act.

7 New section 12 – Discretionary decision-making test

7.1 New section 12(5)(e) identifies as an example of an exceptional circumstance "*where there is a significant risk to the health or safety of the holder of the lease or licence or their stock".* It is readily foreseeable that other persons, most obviously the employees or family of the lease or licence holder, might legitimately be on the property. Presumably, the health and safety of *"any other person"* on the land might also be considered a legitimate concern of the lease or licence holder. It is suggested this is included in the example.

Recommendation

7.2 Expand new section 12(5)(e) to provide that a significant risk to the health or safety of any other person on the land is an example of an exceptional circumstance.

8 Sections 11 – 13 – Process for Commissioner's decision

8.1 New sections 11 – 13 create a discretionary decision-making regime that for all practical purposes duplicates that prevailing under the Resource Management Act 1991 (**RMA**) but is arguably more restrictive than the latter would require. In a previous submission on the Land Information New Zealand *'Ensuring stewardship of Crown pastoral land'* discussion document, the Law Society queried the need for a stand-alone consent process of this kind. The Bill now proposes a more specific and onerous decision-making process.

8.2 It appears the intention of new section 21 is that lease or licence holders who have obtained discretionary consent under the proposed new regime will still need consent pursuant to the relevant plans under the RMA (if required). The Law Society recommends further consideration of whether a dual consenting process is necessary. Unnecessary duplication and

cost to lease and licence holders, and the potential for conflicting requirements to be imposed under separate approvals, should be avoided.

Recommendation

8.3 That further consideration is given to whether a lease or licence holder should be required to obtain consent under both the new Crown pastoral regime and the RMA.

9 Clause 14: new section 100G – Infringement notices

9.1 An infringement notice sent by post to a person is to be treated as having been served on that person "when it was posted" to the person's "last known place of residence or business" (new section 100G(2) – (3)).[6] The deemed postal service provisions apply to a number of offences created in the Bill (new section 100D).

9.2 This gives rise to two practical concerns:

a. postal delivery in New Zealand is now restricted to only a few days a week, so there will likely be a delay in the person receiving the notice, and

b. some people are transient and may never receive an infringement notice posted to their last-known residential or business address.

Recommendation

9.3 That the committee seeks advice from officials on other practical means of achieving prompt and reliable service (such as "signature required" courier to the last-known residential address), rather than the deemed postal service provisions in the Bill.

10 Clause 14: new section 100L – Power to amend Schedule 1AB

10.1 A new Schedule 1AB (Classification of Pastoral Activities on Pastoral Land) is inserted by clause 15, and new section 100L (clause 14) provides the power to amend Schedule 1AB.

10.2 The breadth of the discretion conferred risks allowing additions to be made to the list of prohibited activities currently in Schedule 1AB. This could materially change the terms of a pastoral lease without any input from or compensation to the lease or licence holder. Given that those lease or licence holders have existing property rights, this may be a form of appropriation without compensation which ought not to be permitted by way of an Order in Council (if it is permitted at all).

10.3 The Legislation Guidelines state that any new legislation "should respect property rights" and that "the Government should not take a person's property without good justification".[7] The Guidelines also state that a "rigorously fair procedure is required … and compensation should

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6 The Law Society has commented previously on issues relating to service of infringement notices: see submission 5.4.2018 on the Conservation (Infringement System) Amendment Bill: https://www.parliament.nz/resource/en-NZ/52SCEN_EVI_72400_579/2098eb0d5c699bc50474d15eb3c2b67bd0a84e8a

7 Legislation Guidelines: 2018 edition, at chapter 4.4. Available at http://www.ldac.org.nz/assets/documents/Legislation-Guidelines-2018-edition-2020-06-25.pdf.

generally be paid". The Law Society recommends that the committee seeks advice from officials on whether section 100L complies with the Legislation Guidelines.[8]

10.4 The supporting material to the Bill states that Schedule 1AB can be amended by Order in Council following public consultation.[9] However, section 100L does not provide for public consultation and only refers to consultation with the Ministers of Agriculture and Conservation. If public consultation is intended, this needs to be provided for.

10.5 If there is to be no public consultation, the Law Society recommends that the power provided in new section 100L(1) is limited to any amendment, replacement, or deletion of any of the permitted or discretionary activities listed in Schedule 1AB.

10.6 The Law Society also considers that new section 100L needs to make clear that any changes to Schedule 1AB do not affect any consent already granted, for the duration of that consent.

10.7 On a minor note, new section 100L(5)(b)(ii) refers to "*good husbandry".* This is an antiquated (and gendered) term which does not appear in the principal Act. More appropriate language should be considered.

Recommendations

10.8 That the committee seeks advice from officials on whether section 100L complies with the Legislation Guidelines.

10.9 If there is to be no statutory requirement for public consultation, the Law Society recommends the power provided in new section 100L(1) be limited to amendment, replacement, or deletion of any of the permitted or discretionary activities listed in Schedule 1AB.

10.10 Amend new section 100L to make it clear that any changes to Schedule 1AB do not affect any consent already granted, for the duration of that consent.

10.11 Substitute "*good husbandry"* with "*good animal management"* in new section 100L(5)(b)(ii).

11 New Schedule 1AA – Transitional, Savings and Related Provisions

Clause 4 – Pending decisions relating to applications for consents, recreation permits, or easements

11.1 Legislation should generally have prospective and not retrospective effect.[10] Clause 4 of Schedule 1AA states the Commissioner must deal with an application in accordance with Part 1 of the Act (as replaced by the amendment Act). Clause 4 breaches a legitimate expectation that existing applications made to the Commissioner that have already been lodged, but not finally dealt with, will be determined according to the law in force at the time the application was lodged, and is therefore retrospective in effect.

11.2 The Law Society acknowledges that the strength of the presumption against retrospective legislation depends on context. While Parliament has the power to pass such legislation, good

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8 See http://www.ldac.org.nz/: "The Guidelines have been adopted by Cabinet as the government's key point of reference for assessing whether draft legislation is consistent with accepted legal and constitutional principles".

9 Departmental Disclosure Statement page 4; see also Explanatory Note to the Bill.

10 Legislation Guidelines: 2018 edition, at chapter 4.7, chapter 12; and s 7 of the Interpretation Act 1999.

reasons are required to justify such a departure in order to avoid infringing the rule of law. We have not identified any justification for retrospectivity in the supporting materials to the Bill.

Recommendation

11.3 Amend clause 4 of Schedule 1AA to remove the retrospective effect of the Bill on applications to the Commissioner that have already been lodged but not finally dealt with.

Arti Chand
Vice President

27 November 2020