

25 June 2020

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Crown Pastoral Land Reform Bill

Purpose

1. We have considered whether the Crown Pastoral Land Reform Bill ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').
2. We have not yet received a final version of the Bill. This advice has been prepared with the latest version of the Bill (PCO 21179/6.8). We will provide you with further advice if the final version of the Bill includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 25(c) (right to be presumed innocent until proven guilty). We have set out our analysis below.

The Bill

4. The Bill amends the Crown Pastoral Land Act 1998 and the Land Act 1948. The Bill aims to better manage and control any further development or intensification of pastoral farming activity on Crown pastoral land and encourage sustainable ongoing use of the land for pastoral farming and recreation.
5. The amendments:
 - a. 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 freehold and sold to the pastoral leaseholder;
 - b. implement an outcomes-based approach that considers adverse effects on inherent values (including cumulative effects) over the whole Crown pastoral land estate over time;
 - c. provide clearer, more transparent decision-making, stronger accountability, and more opportunity for public involvement; and
 - d. support evolving relationships between Māori and the Crown while recognising the relationship of Māori with their ancestral lands.

Consistency of the Bill with the Bill of Rights Act

Section 25(c) – right to be presumed innocent until proven guilty

6. Section 25(c) of the Bill of Rights Act affirms that everyone who is charged with an offence has the right to be presumed innocent until proven guilty according to the law. This requires the prosecution to prove beyond reasonable doubt that the accused is guilty.
7. Strict liability offences give rise to a *prima facie* issue of inconsistency with s 25(c) because the accused is required to prove a defence (on the balance of probabilities) to avoid liability. This means that, where the accused is unable to prove a defence, they could be convicted even where reasonable doubt exists as to their guilt.
8. Clause 100D of the Bill creates new strict liability infringement offences to be inserted into the Crown Pastoral Land Act 1998. We understand that the purpose of including new offences is to encourage leaseholders, licensees, or persons seeking to carry out recreational activities on Crown pastoral land to apply for a consent before undertaking the activities. The offences are:
 - a. burning vegetation without a consent (if a consent is required by new section 7);
 - b. affecting or disturbing soil without a consent (if a consent is required by new section 8 or 9);
 - c. contravening a stock limitation or an exemption from a stock limitation;
 - d. undertaking an activity without a recreation permit (if a permit is required under section 66A of the Land Act 1948); and
 - e. felling, selling, or removing any timber, tree, or bush without a consent (if a consent is required under section 100 of the Land Act 1948).
9. Such offences may nevertheless be consistent with the Bill of Rights Act if the limits can be demonstrably justified in a free and democratic society, as per section 5 of that Act. This section 5 inquiry may be approached as follows:¹
 - a. does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
 - b. if so, then:
 - i. is the limit rationally connected with the objective?
 - ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
 - iii. is the limit in due proportion to the importance of the objective?
10. We consider that the proposed infringement offences will encourage leaseholders, licensees, or persons seeking to carry out recreational activities on Crown pastoral land to obtain the relevant consents before undertaking the specified activities, and in doing

¹ *Hansen v R* [2007] NZSC 7 [123].

so, the infringement offences are rationally connected to the Bill's objective to maintain or enhance the value of Crown pastoral land (which we consider is a sufficiently important objective).²

11. Further, in incentivising such compliance, we consider any limit on the right to be presumed innocent until proven guilty can be justified, for the following reasons:
 - a. The offence provisions apply to persons who have chosen to undertake certain activities on Crown pastoral land;
 - b. The offence is a regulatory offence and does not result in a criminal conviction;
 - c. The defendant is in the best position to justify their apparent failure to comply with the law (i.e. did they have a relevant consent), rather than requiring the Crown to provide the opposite;
 - d. The penalties are solely financial in nature, are at the lower end of the scale and proportionate to the seriousness of the offence. The maximum fine for an infringement offence must not be more than twice the amount of the infringement fee for the offence (the infringement fee must not be more than \$1,000).³ No terms of imprisonment can be imposed; and
 - e. The leaseholder has a right of appeal and review rights as set out in the Summary Proceedings Act 1957 and the Summary Proceedings Regulations 1958.
12. For these reasons, we consider any limits within the Bill on the right to be presumed innocent until proved guilty affirmed in s 25(c) to be justified under s 5 of the Bill of Rights Act.

Conclusion

13. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

Jeff Orr
Chief Legal Counsel
Office of Legal Counsel

² These being described by Land Information New Zealand as ecological, landscape, cultural, heritage and scientific values.

³ See clause 100N(f) of the Bill.