Crown Pastoral Land Reform Bill

The High Country Accord Trust

Submission to Crown Pastoral Land Reform Bill

The South Island high country is a unique landscape and a taonga for all New Zealanders. It embodies a range of values: spiritual, cultural, ecological, economic, historical, scientific, recreational, agricultural, and more. The best and strongest foundation for its management is a system of collaboration founded on the contractual relationship between Crown and pastoral lessees rather than a regulatory one designed to create opponents.

22 February 2021

1 Organisation details

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How do you design a system to manage 1.2 million hectares of remote and challenging land of extraordinary diversity; where you have permanently alienated the right of exclusive occupation to people who understand the land; have a deep affinity for the land; have maintained and improved the land; and who want to work with the Crown within the existing contractual relationship?

Do you use the coercive power of legislation to impose a set of rigid rules, and alienate the very people upon whom you rely for frontline management?

Or do you build on the existing relationship to devise a system which incentivises collaboration and minimises your costs?

3 Submission on Crown Pastoral Land Reform Bill

ENVIRONMENT COMMITTEE

Introduction

The High Country Accord opposes the Bill in its entirety.

We support the objective of the Bill as set out in the explanatory statement: *"to ensure that LINZ will administer Crown pastoral land in a way that maintains or enhances the ecological, landscape, cultural, heritage, and scientific values of the land for present and future generations, while providing for ongoing pastoral farming of the land."*[1]

We also recognise this land has particular significance for Māori, in particular Ngāi Tahu, and that it is a taonga for all New Zealanders.

However, we believe the cumulative effect of the Bill will be to work against its objectives to the ultimate detriment of the High Country's inherent values.

While the Bill's explanatory statement notes its intention to *'encourage pastoral farming which is sustainable'*[2] the Bill does exactly the opposite and contains provisions that will make it more difficult for lessees to deliver their stewardship of the High Country.

We believe the Bill's objectives would be better achieved by the Crown (acting through the Commissioner of Crown Lands and Land Information New Zealand) working collaboratively with its 150 contractual partners, building on the current regime and the many environmental and other benefits it has delivered over the past 70 years.

The Accord's solution is for the Crown and lessees to agree contractually binding farm plans as an alternative approach. These plans would take account of the particular inherent values of each property, as well as any particular risks, and allow for the development of a farm management system that properly recognises any such values; addresses any such risks; and removes the need for a recurring complex consent application process. This proposal, and a mechanism for transition, is set out in more detail later in this submission.

The Bill on the other hand:

- Adopts a 'one size fits all' rules based approach which fails to recognise that delivery of better environmental outcomes needs to take account of the diversity of landscapes and inherent values of the High Country
- Has many technical flaws which deliver perverse results (e.g., imposing a set of conditions that effectively prohibits the removal of wilding pines and other pest plants in many circumstances – see Part 4 of this Submission)
- By failing to recognise the ownership by lessees of *'improvements'*[3] will have the effect of incrementally diminishing the fundamental rights granted by our leases to farm – thereby appropriating over time property rights of lessees in their improvements without compensation

[1] See page 2 of the Explanatory Note
[2] See bullet point 2 on page 2 of the Explanatory Note
[3] As defined in the Land Act 1948

- By setting up an adversarial system of management with rigid rules and complex processes increasing costs, undermines the security of tenure granted by the 1948 Land Act and the pastoral lease tenure, and will consequentially undermine the incentives for enhanced stewardship of the land which that security of tenure has delivered over the past 70 years
- Changes the nature of the relationship between Crown and lessee from a fundamentally contractual one to one founded in regulation and policing, thereby prejudicing the opportunity to work together constructively
- Adds layers of cost and regulatory process complexity which largely duplicate more general regulation foreshadowed for the primary sector by freshwater and biodiversity National Policy Statements and regulation, and will certainly not *'improve the timeliness and efficiency of the decision-making process'*[4]
- Is inherently discriminatory in that it singles out 150 lessees as vulnerable to criminal liability for acts permitted to other New Zealanders
- In removing tenure review from the 'toolbox' needlessly restricts the methods available to the Crown to acquire lessee interests where the public interest requires
- In abolishing tenure review, fails to recognise the legitimate expectation of lessees already well-advanced through tenure review; and fails to preserve any rights accruing prior to enactment arising not from repeal, but from improper decision-making

Above all, the Bill's failure to reflect the realities of high-country farming; the stewardship role played by the lessees; and the practical aspects of plant and pest management, means its enactment will not deliver the improved environmental outcomes it purports to seek.

The Accord appreciated the willingness of LINZ officials to accept our invitation to visit a range of properties and get a better understanding of our concerns. However, we are disappointed by the lack of substantive consultation during the process of drafting the Bill.

In March 2020 further consultation was promised, but unfortunately it did not eventuate.

It is critical that the Environment Select Committee take the opportunity to visit a range of properties to understand how farming and environmental stewardship in the High Country are not mutually exclusive and how sustainable environmental management is already integrated into our daily lives.

Giving lessees the opportunity to work with officials on an exposure draft would have produced a far better outcome.

The chance to step back and secure an enduring and positive approach remains.

Our submission is divided into four parts:

- Part 1 provides background to the Accord and to pastoral leases
- Part 2 explains in greater detail why the Accord has fundamental opposition to the Bill
- Part 3 identifies the Accord's preferred approach of transitioning under the current system to agreed farm plans

[4] See page 3 of the Explanatory Note

- Part 4 sets out specific drafting issues

Part 1

Background to the Accord

The High Country Accord is a not for profit trust established in 2003. Its purpose is to promote and protect the rights of holders of pastoral leases under the Crown Pastoral Land Act 1998 and the Land Act 1948, 'with a view to ensuring the future economic, environmental and social sustainability of the South Island High Country.'

Over the past two years the Accord's membership has comprised more than 90% of pastoral lessees and more than 95% by area.

The lessees are the Crown's contractual counterparty. We are the group most directly interested in, and affected by, any relevant policy, legislative or regulatory changes. Our strong preference is to work with the Crown, and we are dismayed that the Crown has chosen the approach reflected in the Bill.

All lessees have invested (in many cases over multiple generations) enormous human and financial capital in our properties. We own the improvements on the land.

Our daily lives, our families, our incomes, and our futures, as well as those of many others in our rural communities and in the many businesses that are our suppliers and our customers, depend on the security of tenure granted by the pastoral lease.

Background to the pastoral lease

The Land Act 1948 – context and purpose

The Land Act 1948 created the pastoral lease.

That Act gave the right of freehold to farmers already leasing Crown land on permanent leases; the underlying principle being that a secure tenure is the basis of farming progress.

An exception was made for the leases and licences of the South Island High Country.

Concerned by the adverse impacts of pest animals (primarily rabbits) and weeds in the high-country, the Crown saw pastoral leases as a way it could limit the use and disturbance of high-country land and make the lessee responsible for weed and animal pest control and erosion control.[5]

Except for those express retained rights, the Crown alienated almost the entire bundle of property rights to the lessee to provide "absolute security of tenure", creating an enduring contractual relationship.

In March 1949, the Minister of Lands (The Hon. Mr C F Skinner) wrote to lessees and licence holders explaining the Government's intention for the 1948 Act. He said:

[5] Today, those objectives would likely be achieved by a grant of freehold supplemented by covenants or other legal mechanisms

I referred previously to pastoral land being held on pastoral lease or pastoral occupation licence. Neither of these tenures gives the lessee the right to acquire the freehold, for the reason that there are special circumstances relating to pastoral lands (soil erosion, control of rabbits, prevention of overstocking, prevention of indiscriminate burning, and so on) which can best be provided for if the land is held under lease or licence rather than on freehold tenure. However, to give as many holders of pastoral land as possible absolute security of tenure, provision is made for pastoral lands to be let on lease for thirty-three years, perpetually renewable as of right. This will be a considerable advance on the present pastoral run licence, under which on expiry the Governor-General determines whether or not the land is to be again let on licence and, if it is to be let again, whether the run should be subdivided. Where the land is not suitable for a pastoral lease, it will be let on pastoral occupation licence for any term up to twenty-one years.

You will see, therefore, that the tenancy of pastoral lands is definitely improved by abolishing the possibility of subdivision on expiry, and by making provision for a pastoral lease perpetually renewable as of right where the land is suitable for such a tenancy.

…[6]

This letter from the responsible Minister at the time unequivocally states the Government's intention that the pastoral lease was to deliver security of tenure and with it better land management.

This is precisely what has occurred – security of tenure has delivered better land management and over time significantly improved biodiversity.

Under the pastoral lease system, the High Country is in much better condition than it was in 1948, and in many cases is delivering far superior environmental outcomes to similarly situated land parcels not governed by this system. Good environmental outcomes and high country pastoral farming are therefore not mutually exclusive.

The contractual relationship of the lease already provides the framework for the Crown as lessor, and the farmer as lessee, to work together: that relationship should form the basis of any future management system.

The contractual relationship

The relationship between the Crown as lessor and the farmer as lessee is not a regulatory relationship. It is contractual. The representation in the Crown's 2019 Discussion Document of the Crown's management role as regulatory is fundamentally flawed – legally and historically. The provisions of the Land Act (and subsequently the Crown Pastoral Land Act) which provide for the management and control of some lessee activities are, in effect, implied terms of the lease, implemented through legislation to ensure consistency across all leases and administrative simplicity.[7]

[6] Quoted in *The New Zealand Fish and Game Council v A-G & Others at paragraph 77*
[7] See also the alignment of the provisions for enforcement being framed as contractual remedies

The Crown's role is to manage the Crown's interest as a lessor not as a regulator. Just as occurs in the commercial sector, the best relationships between lessor and lessee respect the interests and objectives of each party and work to the mutual benefit of each.

The change proposed by the Bill, however, fundamentally alters the relationship between the farmer and the Crown away from the contractual relationship to one of regulation. Inevitably this will adversely influence the relationship and prejudice the achievement of the goals of the respective parties.

It is important that this submission records the key features of the pastoral lease. The lessee's rights are:

- The right of exclusive possession and quiet enjoyment to the entire leased area
- The exclusive right to graze the entire leased area
- The perpetual right of renewal every 33 years
- Ownership of their *'improvements'*[8] – most obviously buildings, roads, fences, bridges, power infrastructure and so forth, but also (and very importantly in the context of the Bill) improvements to pasture, cultivation of pasture, cleared pasture, drainage infrastructure, water infrastructure for stock and domestic use, and improvements to the character or fertility of the soil (see discussion below)
- The right to transfer the lease (whether by succession or sale) as the lessee chooses subject only to the Crown being satisfied that the transferee has the necessary skills to farm the lease properly.

To achieve the incentives for long term stewardship by the lessee, the Crown's rights as lessor are intentionally limited[9]:

- The right to review the rent every 11 years in accordance with (now settled) law
- The right to impose stock limits on the land and to control certain activities such as burning, tracking, new cultivation, and clearance of 'bush and scrub' (i.e., the act of making 'improvements' which become the property of the lessee)
- The right of entry to inspect the land
- The right to control activities on the land other than pastoral farming through the 'recreation permit' regime
- The right of resumption in limited circumstances for fair compensation.

The lessee has no right to the soil and must farm the land diligently, keeping weed and animal pests under control.

Improvements and the Rule of Law

The rights conferred under the lease established the basis for the long term economic investment in leased properties.

[8] As defined in the Land Act
[9] See the Minister's letter referred to above

That investment usually takes the form of an activity which falls within the definition of 'improvements' under the Land Act 1948.

> *improvements means substantial improvements of a permanent character, and includes reclamation from swamps; clearing of bush, gorse, broom, sweetbrier, or scrub; cultivation; planting with trees or live hedges; the laying out and cultivating of gardens; fencing (including rabbitproof fencing); draining; roading; bridging; sinking wells or bores, or constructing water tanks, water supplies, water races, irrigation works, head races, border dykes, or sheep dips; making embankments or protective works of any kind; in any way improving the character or fertility of the soil; the erection of any building; and the installation of any telephone or of any electric lighting or electric power plant*

Over generations those improvements and the labour of the farming families have contributed significant economic benefits to New Zealand. The value of those benefits comes not only from the direct revenues generated by fine wool merino products, sustainable meat, and other high-quality farm produce, but also through tourism and through the high-country's role in establishing and maintaining New Zealand's international brand. These benefits also depend on lessees maintaining the land's inherent values.

The Courts have recognised that the definition of *'improvements'* is inclusive – not exclusive. They have accepted for instance that enduring animal pest control is an improvement. They have also accepted that improvements are the property of the lessee – not the Crown.[10]

The fact that improvements (as defined) belong to the lessee is the legal premise on which rents have been calculated since 1948 and explains the rationale for an assessment of the carrying capacity of the land in its 'base' or 'unimproved' state.[11]

The fact that improvements belong to the lessee also means that legislative change which:

- appropriates those improvements, or
- prejudices those improvements, or
- diminishes the lessees' opportunity to utilise those improvements,

is an appropriation of private property rights. If that occurs without fair compensation, then a fundamental breach of the rule of law occurs.

The Bill will have such an effect.

The High Country – description and contribution

Just as the pastoral lease instrument is poorly understood by the wider public, so too, is the scope and contribution of the lessees, whether as employers, as producers of internationally acclaimed products that generate overseas earnings and support New Zealand's global brand, or as frontline managers of the land.

Today, there are some 160 leases left from the approximately 350 leases which existed in 1995 before the Crown Pastoral Land Act. The pastoral leases occupy some 1.2 million hectares, spread between Marlborough and Southland. Five are less than 1000 hectares (the smallest lease being

[10] See the decisions in *Forest Range* and *Minaret*
[11] The Crown should not receive a rent on the value of investments not made by the Crown but by the lessee

257 hectares), while six cover more than 20,000 hectares. The majority of leases are less than 10,000 hectares.

Most leases run primarily sheep; some cattle; and a few deer herds.

Almost all lessees are actively engaged in weed and pest control both on their own farms and in collaboration with neighbours and/or community groups. Looking after the land is in our blood. Not only is it in our commercial interests to do so (as markets demand an authentic sustainable source for our products), we believe it is the right thing to do.

We have an institutional knowledge of the landscape which is invaluable to its protection.

A number of leases have formal conservation covenants; many have informal conservation plans; and almost all will be undertaking some form of animal and weed control over and above their contractual obligations.

Many submissions from individual lessees will discuss these initiatives in more detail.

There is no centralised data base for leases, and such data needs to be treated with care as properties are often farmed in conjunction with freehold properties and properties do not prepare their financial statements on a consistent basis.[12]

However, data collected by the Accord in 2019 from a selected sample of leases indicated a three-year annual average spend of $6.23 per hectare on weed control across the 200,000 hectares surveyed. The annual spend ranged from $20,000 through to $310,000. However, in some cases this data excluded the value of lessee time and lessee contribution of materials, equipment, and consumables. The cost of items such as helicopter or fixed wing flying time, vehicle transport to remote locations, and labour of the farmer (and family) can be significant.

The Bill threatens this activity by requiring consent (now at a cost) for activities leaseholders should be encouraged to undertake – notably, clearing pest plants.

The Accord has unsuccessfully attempted to obtain figures from DoC on the amount per hectare it spends on weed and pest control; however, we are confident that both the amount spent by lessees per hectare and the effectiveness of that spend would exceed that of DoC.

The same survey (taken from a sample of leases with an aggregate combined area of just under 200,000 hectares) indicated that approximately 1.45 million stock units are managed across all the leases, or approximately 1.14 stock units per hectare. This is very different from a typical low country dairy farm: average cows per hectare across of New Zealand dairy farms in 2016/2017 was 2.81 (or @ 7 stock units per cow = 19.67 stock units).[13]

Once again, the data needs to be treated with care as some properties could be measured by hectares per stock unit, rather than stock units per hectare. It is also acknowledged that stock rates might be most accurately measured by reference to the productive land of a lease, rather than total leased area.

However, the general picture of a very low intensity farming system is valid.

[12] Note we oppose the power to obtain information on a compulsory basis – see Part 4
[13] Livestock Improvement Corporation and NZ Dairy statistics 2016/2017

Between 2008 and 2018 stock units on the properties surveyed increased from 217,805 to 225,094. This increase of some three percent belies the claims of increased intensification which underpin many of the assumptions implicit in the Bill.[14]

Furthermore, the present system already allows the Crown to regulate stock numbers – either by whole of lease or by identified land blocks.[15]

The Accord has not seen any data from LINZ which indicates any material intensification of farming systems in the high-country pastoral lease estate.

To the extent that Bill proceeds in part on the need to limit intensification it does so on a flawed premise.

The tenure review process – do not throw away a useful tool

While there is some contemporary commentary when the CPLA was passed that it was expected that tenure review would result in all leases going through the process, this was never a realistic expectation. Commentary to this effect today seems more an attempt to justify the abolition of tenure review, now that it is clear that the pastoral lease system remains an appropriate option for a significant number of leases.

Slightly more than half of the leases in place in 1998 have completed tenure review. Most have delivered excellent public benefits by way of:

- additions to the conservation estate to facilitate biodiversity protection
- the aggregation of coherent conservation areas; or
- public access for recreation purposes

Of the remaining 160 or so leases, 28 leases are at some stage of the tenure review process. Sixteen are in the consultation phase between the Crown and lessee, with a low likelihood of progressing sufficiently before the Bill is enacted and the process abolished. A few more have been removed from the process by LINZ following a Ministerial refusal to provide funding.

The remainder are not in tenure review (having not entered or withdrawn). The reasons vary:

- No obvious way to divide the lease between freehold and conservation land
- Unrealistic early expectations from the Crown (in some cases a whole of lease purchase, or a return of substantially all the lease to the Crown leaving a non-viable farm unit)
- Substantial differences between LINZ and Department of Conservation employees about outcomes
- Subsequent intransigence on the part of the Crown in insisting that the creation of conservation covenants was an inadequate protective mechanism for inherent values
- Indecision and delay by the Crown
- The Crown re-visiting previously agreed valuations

[14] See page 2 of the Bill's Explanatory Statement
[15] See also the Accord's submissions in Part 4 concerning the ongoing utility of stock limitation clauses alongside the current carrying capacity concept

- Lack of resources on the part of both lessee and Crown to undertake the process – time, money, skills

While there has been some well-publicised criticism of tenure review outcomes, it centres on no more than a dozen or so instances. In many cases, the adverse outcomes identified by critics are mis-stated, misunderstood, or exaggerated. Most reflect a poor understanding of rights alienated under the pastoral lease to the lessee and the limited nature of the Crown's residual interest and the consequential value implications.

If any criticism is warranted, it is not the process itself which should be criticised – rather it is the quality of decision-making (both strategic and tactical).

Abolishing tenure review will undoubtedly come to be regretted, when (inevitably) the time comes where the Crown perceives a public benefit could best be achieved through such a deal.

The tenure review process – preserve accrued rights

Abolishing tenure review without appropriate transitional provisions which preserve existing rights is bad law. There is a serious risk of unfairness, and a lasting grievance.

In many instances, leaseholders have been in negotiations with the Crown for more than a decade. They have spent tens of thousands of dollars engaging in a process with legitimate expectations that the Crown would act fairly, in good faith, and in accordance with the provisions of the CPLA.

Those expectations have not been met. In some instances, the negotiations in recent years appear to have taken on a capricious nature, characterised by delay and inconsistency in anticipation of this Bill.

It is likely that some leaseholders will have rights of recourse against the Crown based on the dashing of those expectations. In some cases rights may accrue from flawed decision-making by the Crown.

The Bill proposes (in Schedule 1AA – Transitional Provisions) to remove any accrued rights.

That is absolutely contrary to the rule of law, and to generally accepted principles that Parliament should not legislate to deprive rights which have accrued prior to legislation – especially where those right lie against the Crown.

The Bill must make provision for:

- Those leases in tenure review to have a fair opportunity to progress (with the Crown being willing to devote adequate resources to doing so)
- the preservation of accrued rights arising from reviewable decision-making by the Commissioner of Crown Lands and/or the Minister.

Paragraph 6 of Schedule 1AA must be amended accordingly.[16]

[16] See Part 4 of this Submission

Part 2 – the policy objections in more details

High level concerns explained in more detail

We have stated that the Bill threatens property rights and undermines our security of tenure.

Those rights and the security of tenure are critical to lessees continuing to deliver their stewardship role.

The Land Act 1948 has been extraordinarily successful in improving the inherent values of the High Country over the past 70 years. The designers of the pastoral lease mechanism had great insight that security of tenure and respect for the accrued property rights of the lessees was key to delivering better environmental outcomes.

The Bill takes a different approach. It threatens our property rights and undermines the security of tenure. In doing so the impacts will ultimately reflect in poorer environmental outcomes than if the Accord's collaborative approach were adopted.

The Bill's threats to property rights and undermining security of tenure

It is important that the Select Committee understands how the threat to property rights occurs.

The Bill does not overtly and expressly take a specific asset[17], rather it is a subtle process which will occur over time arising from the objects of the Bill and the scheme of decision making.

It does so by failing to recognise properly the lessees' property rights in their *improvements*[18] and their rights o repair and maintain those improvements. These are critical to the sustainability of the farming proposition.

Two practical examples will serve to make the point:

- The Bill's failure to provide for the protection of historical *improvements* belonging to the lessee in the form of pre-1948 tracks
- The Bill's failure to adequately provide for the protection of the right to clear vegetation from areas previously cleared and therefore forming an *improvement*

Note: these are just two examples.

Historical Tracks

Tracks provide a straightforward easily understood example of lessee concerns. Paragraph 16 of Part 1 of Schedule 1AB allows for the *'maintenance'* of existing *'consented'* roads and tracks.

Roads and tracks on pastoral leases fall squarely within the definition of the lessees' *improvements*.

Many (possibly a majority of key) tracks on pastoral leases date to the earliest days of occupation of the land. They will either have never been consented or they are so historical that records of such consents may be lost. Such tracks are critical to the functioning of pastoral leases – either as

[17] As might occur in taking land under the Public Works Act for a motorway
[18] As defined in the Crown Pastoral Land Act 1998

the route to the outside world, or to enable access to the wider property to facilitate the farm operations.

The Bill does not recognise the lessees' rights to those improvements.

Repair (generally considered distinct from maintenance) is not provided for. Lessees will therefore need to apply to the Commissioner for consent to undertake any repair or maintenance of such historical tracks. Often these tracks are vital to the functioning of the property, and quick actions are required to respond to floods and slips. There will be occasions where the damaged track is the communication route to the outside world.

The proposed section 12 imports a decision-making process which should not be required for the repair and maintenance of any existing tracks.

If an historic track is badly damaged by flood, the Bill prohibits the lessee from acting until they have lodged, and had granted, an application for consent to undertake the remedial works.

Lessees will tell of Commissioner decision-making often taking years. Section 12 provides the Commissioner with wide discretion to refuse consent.

If the lessee undertakes the work without consent, they risk an infringement offence and prosecution.

The cumulative effect is to appropriate a property right in such tracks from the lessee to the Crown.

Cyclical and historical clearance of vegetation – the need for balance within the farming system and decision-making

While tracks are obvious, clearance of vegetation is more subtle. It is prone to attract simplistic judgements but is a much more complex issue which requires an understanding of the dynamic of the farming system.

Over the history of pastoral farming, vegetation has been cleared to enable grazing. Much of that clearance occurred before the 1948 Land Act, and in areas beyond areas which would be considered to be the 'developed' parts of the Station. Since 1948 many leases will have had additional consents to clear vegetation from various parts of their properties. Current lessees may not have complete records of such consents obtained by prior holders, and there is scepticism that LINZ records are complete.

Today, it is typically the case that a lease has a critical area of developed and highly productive lower slope land which operates as the 'engine room' of the farm. That engine room has been developed since 1948 through technical advances, fencing and farm management systems.

The developed engine room has allowed for grazing pressure to be taken off the undeveloped areas of the farm and in turn has played a significant role in the improved biodiversity values of those areas.

They remain, however, the critical part of the farming system and the economic viability of the farm.

In summer, the grazing of the undeveloped part of the lease provides the critical balance required for a sustainable farm.

However, what is poorly understood by non-farmers is that pastoral farming is a cyclical and dynamic process which runs over many years. Land which has been historically cleared is often

left (in some cases for decades, in some for lesser periods) without ongoing annual clearance. In that intervening period regeneration occurs.

That regeneration will typically be indigenous vegetation. In some areas this is typically bracken fern; in other cases, manuka and kanuka; and matagouri. A further complication is the ever-spreading invasive exotic briar amongst these species that compounds the proposed consent process for removal of this weed pest.

In both instances, that regeneration is ironically encouraged by soil fertility improvements added to the land by the lessee. Throughout the High Country there are numerous examples of matagouri and manuka shrublands strongly regenerating as a result of the farming activity – not in spite of it.

During the cycle of regeneration there is naturally a progressive reduction in the grazing areas available to stock in the undeveloped areas. This puts pressure on the more developed areas and the remaining undeveloped areas.

At some point, depending on the cycle and the capital available to the lessee, the time comes to clear that vegetation in order to allow the process to begin again.

The Accord has seen the photos included in the submission from The Branches which illustrate the regeneration and the problem of briar within that regeneration.

While today some of that clearance would be regulated under environmental regulation of general application, the fact remains that such clearance did occur and underpins the farming proposition.

That clearance is recognised by the Land Act as a lessee *improvement*.

The cleared land is therefore an *improvement* and a property right of the lessee.

The Bill does not preserve the right of the lessee to maintain that improvement. On the contrary it includes a consent decision-making matrix designed to preclude consent and as a consequence operates to alienate the property right in that improvement from the lessee.

This occurs through the broad discretion conferred on the Commissioner by section 12 and the uncertain parameters within which that decision-making is to occur.

It is compounded by the limitations of section 12(5)(a) and (b) which require clearance to be part of *'a periodic clearance as part of a regular cycle to maintain existing pasture created by oversowing, top-dressing or cultivation'* or in respect of land *'currently subject to a programme of oversowing or top-dressing'*.

But that will not always be the case. Some historical clearance will not have been for the purpose of maintaining existing pasture *'created by cultivation'*. Some clearance will likely be required for grazing access to unimproved land (i.e., land which is not *'subject to a programme of oversowing or top-dressing'*).

In these cases, the Commissioner has no power to consent to the activity, and the lessee's improvement is taken.

Nor does the Commissioner have any power to grant consent unless satisfied that the activity is *'**necessary** to enable the leaseholder to exercise their rights and obligations under their lease'.*

'Necessary' sets a very high bar – a bar which is being decided by an official who has limited direct farming experience. It requires there to be no other option.

Even where the relevant block may come within the scope of section 12(5)(a) and (b), the provisions are characterised by uncertainty:

- what is *'periodic'*
- what is a *'regular cycle'*
- what is *'reasonable access'*

Finally, the provisions of:

- section 12(4)(b) excluding offsetting as a relevant consideration
- section 12(6) excluding the financial viability of the farm as a relevant consideration in the Commissioner's decision, has the result of negating the balancing of interests contemplated by section 4(1) and the provision for ongoing pastoral farming
- section 11(3)(b) requiring the Commissioner to consider current Government policy.

have the cumulative effect that the whole scheme of section 12 operates to deprive lessees progressively of their improvements.

In time, the effective derogation from the original grant and the progressive alienation of lessee improvements will diminish the sustainability of the farming business. At some point the appropriation is not of an improvement, but of the whole farm.

The Bill therefore sets the basis for the ultimate end of high country farming and with it, enormous adverse economic and environmental consequences.

Undermining of security of tenure

The Bill's design for the appropriation of the lessees' improvements, and the clear political signals from the Bill's sponsors that the Commissioner is to wind back high country farming progressively, operate to undermine farmers' confidence in the security of their tenure.

Undermining that confidence will result (has probably already resulted) in diminished long term investment, lower confidence in extending employment opportunities, and higher levels of personal stress within the farming families of the High Country.

Discretionary spending on environmental initiatives is likely to be one of the first casualties of that diminished confidence. As decision-making by the Commissioner puts increasing financial pressure on properties, there will be a diminished commitment by the frontline stewards to the outcomes the Bill seeks to achieve.

The Bill, therefore, will have the unintended consequence of poorer environmental outcomes.

In the same way that the benefits of security of tenure in 1948 have delivered environmental benefits which are now obvious after 70 years, the reverse will be the result of the Bill. The fact that it will take time does not detract from the inevitability of that outcome.

Change to the nature of the relationship – contractual to regulatory – impact on behaviour

We are strongly of the view that the Bill's proposal to change the nature of the contractual relationship between Crown and lessee to a regulatory one underpinned by offence provisions is a considerable strategic mistake and overlooks the predictable changes in lessee and LINZ official behaviour.

Like it or not, a visit from LINZ will be characterised in the future as a visit from the Police.

Under threat of allegations of having committed an offence under the Act, LINZ cannot expect that their visits will be welcomed. That is not to say that LINZ will be treated with anything but courtesy, but there will be a natural trepidation and fear that comes with any Police investigatory visit.

The strength of the current relationships between lessees, LINZ and its contractors will be immediately weakened.

Surely it is obvious that to overlay the contract with such a scheme will undermine the incentives for collaboration and prejudice the achievement of the key outcomes intended by the Act.

Inherently discriminatory and contrary to the principle that all are equal before the law

The fact that the offence provisions of section 100 apply to just 150 properties and families is egregious.

All New Zealanders should be equal before the law. The criminal law should be of general application and not single out a group purely on account of their contractual relationship with the Crown.

The fact that a lessee could be issued with an offence notice for removal of a wilding pine without consent, while his freehold neighbour cannot (or that DoC as a neighbour simply chooses not to do so and is not accountable for the spread of the resulting seed) is submitted to be contrary to accepted principles of law.

We are not aware of any other example of the Crown choosing to impose offence provisions upon those with whom it is in a contractual relationship for matters arising from that contract.

It is a point of principle which should be reconsidered.

Fees and regulatory process

The Bill proposes that lessees should bear the costs of the application for discretionary consents process (section 100N(1)(c)).

Neither the Land Act, nor the Crown Pastoral Land Act provides for such fees. Imposing such fees is in substance a unilateral variation of the lease contract.

As a matter of principle, the introduction of a fee regime is objectionable.

As a practical matter, fees will discourage lesser applications. The result will be delay in applications to control weed pests; that delay, particularly in the case of wilding pines, gorse, broom, and briar will exacerbate the problem of pest plants.

If fees are to be imposed, then lessees will expect a vastly improved level of service. The Accord's trustees are aware of multiple instances of consent applications and re-hearings taking years.

This is unacceptable now, but with the new process being so complex and processing times expected to be drawn out further, the imposition of fees will be received badly.

Part 3 – Agreed farm plans: a better approach

The Accord's solution is for the Crown as lessor, through the Commissioner of Crown Lands, and lessees to agree contractually binding farm plans as an alternative approach. These plans would take account of the particular inherent values of each property, as well as any particular risks, and allow for the development of a farm management system that properly recognises any such values and addresses any such risks and removes the need for a recurring complex consent application process.

The key features of a farm plan would be:

- High level visions of the outcomes the Crown as lessor and the lessee seek for that property
- Identification of key biodiversity and landscape values and protection measures
- Specific management goals for specific blocks of the property and plans to achieve those goals
- Agreed set of permitted activities within those goals
- Agreed plans for the establishment, maintenance, or repair of lessee improvements
- Risk mitigation
- Monitoring and reporting
- Integration and compatibility with other regulatory requirements (to avoid duplication)
- Integration and compatibility with sustainability requirements of key commercial partners
- Practical mechanisms for the Crown as lessor to enforce provisions of the farm plan as a contractual counterparty – not by way of offence provisions

The benefits of individual farm plans include:

- A framework to identify the specific outcomes the Crown, as lessor, and the lessee seek for that property
- An opportunity for meaningful input from mana whenua, particularly Ngai Tahu
- The opportunity to develop and record a collectively-agreed long-term vision for the property, which takes account of its particular inherent values

- The basis for a catchment and/or multi-property management approach where appropriate
- Support for a collaborative relationship between the contractual partners
- Enhanced efficiencies on the farm and within LINZ and thereby reduced costs to both Crown and lessee (increasing the potential for resources to be applied to the outcomes)
- Greater knowledge of individual properties within LINZ
- A sample of 150 properties which could guide the Crown's roll out of farm plans to the wider primary sector
- A framework flexible enough to accommodate innovation and technological change

The legislative changes needed to accommodate this within the Bill are not significant. They are developed in Part 4.

In short, Schedule 1AB Part 1 (Permitted Pastoral Activities) can be extended to include activities within agreed farm plans, and enabling provisions for farm plans can be introduced into the Act as new sections.

Practically, farm plans will need to be phased in over time, with the present regime remaining in force in the interim. However, farm plans for between 140 and 150 properties is an entirely feasible objective to be achieved within 4 years.

The Accord stands ready to work with the Minister and LINZ on the development and implementation of test plans.

Part 4

Technical concerns explained in more detail (table format)

Part 4 addresses the clauses of the Bill and the Schedules separately

See separate document in landscape format

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Recent articles which paint a different picture of the High Country than the one the Bill assumes

https://www.rnz.co.nz/national/programmes/ninetonoon/audio/2018783610/high-country-camps-for-townie-kids

https://www.odt.co.nz/rural-life/rural-people/tradition-love-land

Part 4

Technical concerns explained in more detail

This Part 4 addresses the clauses of the Bill and the Schedules.

This photo shows a gorse bush to be effectively protected under the Bill

	Issue	Recommendation
6 of Bill	*Definitions* • By explicitly excluding "any value that relates to or is associated with farming activity" from the definition of what constitutes an inherent value, the proposed amendment (6(2)(b)) fails to recognise the contribution of pastoral farming to New Zealand's culture and heritage	• Amend paragraph (b) to read: 'does not include any value that relates to, or is associated with, current farming systems but may include a value which arises from the farming history of the land.'
New section 4	*Outcomes* • the opening sentence refers to 'all persons' • It should be clear this does not include leaseholders as otherwise the Bill imposes inappropriate obligations on lessees • It is important to clarify that there is no implied hierarchy in 4(1)(b) • the Government has repeatedly stated that the legislation was not intended to re-visit the agreed rent setting system (which Parliament has agreed does provide a fair	• Insert new subsection (2) to read: 'Subsection 1 does not apply to any lessee or licensee of pastoral land' • Insert new subsection (3) to read: 'Subsection 1(a) does not import a hierarchy as between maintaining and enhancing inherent values and providing for ongoing pastoral farming of pastoral land.' • Re-number existing subsection 2 as subsection (4) and amend to read: 'Subsection (1)(c) applies only to functions, duties, or powers, that relate to easements, or recreation permits in respect of pastoral land.

	return to the Crown). Subsection (2) accordingly requires amendment	
New section 6(3)	*Exclusion of rights of appeal* The exclusion of any right of appeal from a decision by the Commissioner is unconstitutional The Bill provides the Commissioner with a discretionary decision-making power which has the potential to appropriate property rights without compensation. Any such decision should be capable of review by the Courts	• Delete section 6(3) • See also Lake Station submission
New section 6(4)	*Amendment of Schedule 1AB by order in council*	The power conferred by section 100L to change Schedule 1AB must be limited – see the comment there
New section7	*Burning* This section is very clumsily worded. The relationship between (1) and (2) and clauses 1 and 2 of Part 2 of Schedule1AB is unclear. While there is a similar issue in the CPLA it is better to revert to section 106 of the 1948 Act which provided that a lessee: *shall not burn any tussock, scrub fern, or grass on the land*	Delete new section 7 and instead deal with burning in Part of Schedule 1AB, using the wording of the 1948 Act

New section 9(3)	*Prior consents and protection of existing improvements* This section does not adequately deal with the rights of lessees to maintain *'improvements'*. As explained in Part 2 of this submission, the definition of *improvements* under the Land Act is broad. Many *improvements* existed well before the 1948 Land Act, and many have been established or constructed since 1948, under both the Land Act and the CPLA. The proposed section 9(3) does not contemplate the protection of pre-existing *improvements*, nor *improvements* under the CPLA. As explained, *improvements* made to the land since 1850 underpin the current carrying capacity of the land and its profitability. The Bill makes the lessees' rights to *improvements* vulnerable to appropriation through the consent process without compensation. That is contrary to the rule of law. The significant issues are: • the adequacy of records for existing consents within LINZ and by lessees is likely to be problematic • the maintenance of longstanding improvements which may pre-date the Land Act; for example, the maintenance	This section of the Bill needs substantial re-drafting in consultation with the Accord. It should be a stand-alone section to provide adequate protection for the rights of lessees to improvements The new section needs to be a baseline protection for all existing improvements and the right to repair and maintain them. Improvements which constitute a breach of a consent or which have been noted by an inspection report in the last 10 years as non-complying are acceptable exceptions

	of tracks formed and used since 1880 is not covered., • the maintenance of land first top-dressed in the 1950's prior to the issue of a lease under the land Act may not be permitted • the maintenance of paddocks which have been in cultivation since before the Land Act 1948 will not be covered	
New Sections 10 – 13	*General comment on complexity and impracticality of consent making process* The present consent system is failing. Not because of any process design flaw, but because either the people charged with making those decisions lack the necessary knowledge of the circumstances of the applicant property, or LINZ lacks the resources to process consents in a timely manner. In short, this has historically been a people problem – not a process design problem. The process set out in sections 10 – 13 may well be a delight to a desk bound process engineer, but will be a practical shamble of confusion and delay.	Transitioning to a system of agreed farm plans will allow for a much more practical management framework for leases: • taking account of the inherent values of each lease • minimising cost to both Crown and lessee See also Law Society submission

New section 11(3)(b)	*Commissioner to take account of Government policy* The Commissioner should act consistently and independently of the whim of a current Minister. Additionally, the uncertainty of the scope of this section is undesirable – what Government policy? And how might it be inconsistent with this Act? Is it to be limited to a consideration of the Bill's stated outcomes – or is a wider consideration required? How is the Commissioner to apply this requirement in the maze of section 12?	Clause 11(3)(b) should be deleted see also Law Society and Lake Station submissions
New section 12	*Discretionary consent decision-making process*	This section of the Bill needs substantial re-drafting in consultation with the Accord. It has multiple drafting issues which require a collaborative round-table discussion to solve. A prescriptive Schedule cannot adequately cater to the diversity of property types that come under the pastoral lease regime.
New section 12(1)(a)	*Commissioner may decline consent if he thinks there is a better alternative to the lessee's proposed action*	Delete this paragraph

	How will the Commissioner identify alternatives, let alone assess their respective merits? The Commissioner does not visit pastoral leases. LINZ staff do so rarely, meaning their knowledge of the individual properties' particular topographical and other characteristics is limited. This provision could see farmers forced to implement sub-optimal solutions, and potentially compromise farming and environmental outcomes.	
New section 12(1)(c) & (d)	*Use of the word 'necessary'* This sets a high bar, and one the Commissioner is not well placed to assessment as it will likely turn on the individual farming system in operation	Delete '*necessary'* and replace with *'reasonably required'*
New section 12(3)	'*no more than minor*' Again, the Commissioner is not well placed to make this assessment in any event	Noted as a factor in the need to re-design the scheme of consenting
New section 12(4)(b)	*Offsetting not relevant* The Accord cannot understand the principled basis for excluding offsetting as a relevant consideration.	Reverse the approach and expressly permit the Commissioner to consider offsetting, avoidance, risk control, mitigation and remediation matters in determining the overall level of adverse effects

	While it may not be appropriate in all cases, surely it is a matter for holistic consideration in the context of a particular application? Furthermore, the words *'including as a way of counterbalancing adverse effects'* are vague and uncertain. It will also be difficult to distinguish actions designed to remedy or mitigate an adverse consequence from an action which is an offset	
New section 12(5)	*Step 2* As noted in Part 2 of this submission this subsection threatens the property rights of lessees	This section of the Bill needs substantial re-drafting in consultation with the Accord. As above *'necessary'* needs to be replaced with *'reasonably required'*
New section 16	*Stock Limitations* The opportunity should be taken to rationalize what is now an archaic feature of the legislation. The *Clayton* report concluded many years ago that stock limitations had run their course. It is more so now that there has been a comprehensive exercise based on comprehensive data to calculate average efficient carrying capacities.	Amend the legislation so that stock limits are not personal but run with the land Amend the legislation so that the stock carrying capacity of a lease is limited to the greater of: • the average efficient carrying capacity of the lease set for the purposes of fixing rent • any other stock limit agreed to by the Commissioner This would be subject to stock limits imposed by the Commissioner in respect of any particular blocks within a lease.

	The fact that stock limitations are expressed to be personal to the holder results in unnecessary processes on the passing of a lease by way of succession or sale	
New section 100D-J	*Infringement offences* The fundamental change in the relationship and the impact on behaviours of lessor and lessee are discussed in Part 2 of this submission. They are wrong as a matter of principle. The contractual and civil remedies is an appropriate and adequate mechanism	Delete these provisions
New Section 100L(1) and (6)	*Power of Government to amend Schedule 1AB by order in Council* It is inappropriate to confer a power on the Executive to implement changes which could impact the property rights of leaseholders. Any such change should as a matter of general principles of law and good legislation be a matter for primary legislation	Amend section 100L(1) by precluding: • the deletion of any permitted activity • the addition of any prohibited activity • any other change which impacts the property rights of leaseholders Ensure that any change does not adversely affect any consent already granted or lodged Delete subsection (6) See also Law Society and Lake Station submissions

New Section 100N(1)	*Regulation making powers* The Bill confers on the Minister substantial power to amend by regulation the primary legislation. In particular: • the power to prescribe matters the Commissioner must take into account effectively allows the Minister to shift the balance of the primary legislation in a manner adverse to the interests of farmers. Any such change should be reserved to Parliament • the ability to set fees is inappropriate to the contractual relationship as explained in Part 2 • the ability to create new offences is contrary to accepted principles of the rule of law (see Part 2 relating to the offence regime generally) • the data collection provision is an infringement of the privacy rights of holders and the rights of businesses to keep their business information confidential	Delete paragraphs (1)(b), (c), (e), and (h)

Land Act changes **New section 24(1)(i)**	*Commissioner supporting Walking Access Commission* The language of the proposed new section 24(1)(ia) is vague and of uncertain scope. What does 'support' mean? What does 'as far as practicable mean'? The provision must not be capable of being used to diminish and derogate from the leaseholders' rights of exclusive occupation	Add to this paragraph: *'but at all times respecting the rights of leaseholders and licenceholders to the rights of exclusive occupation granted by their leases and licences*

Proposed Schedule 1AA

General comments

Retrospective effect in respect of existing consent applications

Paragraph 4 of Part 1 Schedule 1AA provides for any outstanding consent to be dealt with under Part 1 of the Act as amended.

In other words, the Bill is to have retrospective effect. This is wrong. All outstanding applications should be dealt with under the existing legislation.

This should be the case as a matter of principle (the rule against retrospectivity), but also because this provision will effectively require consent applications to be re-lodged, as, absent a transitional period, the Commissioner will inevitably send them back as being non-compliant on the grounds of insufficient information. The cost imposed on lessees and the additional administrative burden on the Commissioner is not warranted.

The Select Committee will be aware that lessees already experience considerable frustration with the time taken to process consent applications.

To require lessees to re-start all these processes will waste time, cost money, and generate enormous resentment.

Extinguishing accrued rights

Paragraph 6 extinguishes accrued rights. That should not be the case where lessees are able to establish that the Commissioner or Minister has acted unlawfully or ultra vires in exercise of their decision-making powers under the existing legislation. The right to pursue remedies must be preserved.

The Accord is aware of at least two lessees who have engaged senior counsel to advise on the availability of administrative law remedies. To the extent a wrong has been done, a remedy should continue to be available to them.

Proposed Schedule 1AB

General comments

Drafting of Schedule 1AB started from the wrong point

In 1999, the then Commissioner issued a standing 'consent to minor activities' on pastoral land. Much of the content of that letter has been reflected in the list of Permitted Activities in Part 1, but with a more restricted scope.

While the mechanism of such a standing consent provides a more flexible and practical mechanism than the Bill's complex and rigid processes, that standing consent was also flawed in failing to address the realities of farming practices. Schedule 1AB, in adopting that Standing Consent approach, is therefore likewise flawed, but compounds the flawed approach with some especially absurd requirements for permitted activities.

A better starting point would have been a more substantive consultation process with leaseholders to better capture the range of activities which should fall within accepted definitions of good stewardship and farm management.

As noted, the further consultation with the Accord promised by LINZ in March 2020 did not occur.

Make provision for permitted activities within agreed farm plans

Schedule 1AB illustrates the essential design flaw of the Bill. It seeks to identify bright lines for the classification of activities across the whole of the 1.2 million hectare pastoral estate, but in doing so produces some absurd outcomes.

Even if the activities were perfectly defined (the difficulties with that being detailed below), the essential problem is that this approach does not accommodate the diversity of the high country estate. A property in Marlborough will likely possess distinctly different inherent values to its neighbour let alone to a property in Southland. This diversity demands a more flexible and nuanced approach if the inherent values of each property are to be maintained or enhanced.

The agreed farm plan approach allows the diversity of each property to be considered. It will also provide the framework for a much more collaborative, enduring, and low-cost model for management of the High Country.

The Bill should provide for the progressive adoption of such plans by adding to the list of *'permitted pastoral activities'* a preliminary catch-all provision, which is then followed by amended provisions of Part 1. This could be achieved by inserting the following new paragraph 1 in Part 1:

> *Any activity which forms part of, or is reasonably incidental to, the implementation of an agreed farm plan*

Then add a new definition to Part 4 of the Schedule:

> ***Agreed farm plan*** *means a farm plan agreed between the Commissioner and a lessee or licensee pursuant to section [ ] developed ofr the purposes of achieving the outcome in section 4(1)(a) for that property*

The main body of the Act will require the insertion of new sections (most likely between 12 and 13) providing for the adoption of farm plans:

> *Notwithstanding sections 8 – 11, for the purpose of maintaining or enhancing inherent values on pastoral land for present and future generations, while providing for ongoing pastoral farming of that land, the Commissioner may agree with a lessee or licensee a farm plan for the management of that land, which may define those activities which a lessee may undertake without a separate consent under section 11.*
>
> *A farm plan may have a term of between five and ten years.*
>
> *A farm plan does not affect the obligations of a lessee or licensee to comply with any other laws in respect of that activity*
>
> *Any such agreement shall take effect as a variation of the lease or licence for the duration of the plan.*

Right to continue to have the benefit of property rights in existing improvements – set a new base line

Paragraphs 10 – 16 of Part 1 do not adequately address the rights of lessees in existing improvements. As explained in Part 2 of this submission lessees own the *improvements* on their leases. Failing to recognise this property right will result in its gradual appropriation without fair compensation.

In many cases *improvements* (especially farm tracks) pre-date the Land Act 1948. In other cases, improvements may have been created after the Land Act 1948 but before the grant of the pastoral lease. In these cases, there may not be any existing consent.

In other cases, the quality and completeness of records held by LINZ or lessees is highly questionable. In the case of lessees, records may not have been kept or passed between successive owners. In the case of LINZ, lessees have low confidence that its records are comprehensive.

Recognising these historical improvements and the risk of inadequate records, the better approach is to set a new base line which establishes the lessees' right to maintain all improvements existing on the lease or licence at the time of Royal Assent of the Bill **Except** those improvements which have been identified by a LINZ property inspection at any time prior to that date as being in breach of the lease.

The Bill requires substantial amendment to preserve these property rights. The Accord wishes to work with officials to achieve this outcome.

Particular Issue arising from the ending of tenure review

A further problem which needs to be recognised arises from the abolition of tenure review. Many of the leases which have been in tenure review discussions for years established at early stages in their reviews a reasonably clear understanding of the general manner in which the lease would be divided as between Crown and lessee.

There was often early general agreement that certain land would revert back to the Conservation estate, and other land was suitable for freeholding. Negotiations often dragged on over matters of detail well after the general 'lines of the map' were established.

Lessees often chose not to seek consents for clearance or other discretionary activities during such negotiations because:

- in the case of land reverting the Crown the expenditure on the consent process and the subsequent capital expense in implementing it would be of no use upon implementation of the tenure review
- in the case of land being released as freehold, deferment of an application avoided the duplication of process already required by territorial plans

In the event the Government's decides to end tenure review, such farmers will be doubly prejudiced. The legitimate expectation of the Crown continuing to negotiate in good faith will fail. Land which will now remain in their lease will need to be cleared but permission to carry out this work will be costlier and more difficult to obtain.

The considerations available to the Commissioner must allow for such situations.

Exclusion of curtilage from the scope of Schedule 1AB

While paragraph 3 of Part 1 of Schedule 1AB allows some activities on the curtilage of leases, the relationship between the paragraphs is uncertain. By way of example, is removal of an exotic pest plant within the curtilage permitted if it falls outside the strict limits of paragraph 1?

The better approach is to limit the scope of Parts 1 and 2 of Schedule 1AB to pastoral land and to define pastoral land in Parts 1 and 2 as excluding the curtilage. See the proposed definitions

No provision for activities required by other laws and the lease itself

The list of activities in Part 1 does not include activities required by other laws. The most obvious contemporary example is the requirement to fence waterways arising under the new Freshwater Regulations.

The Bill requires consent to be obtained for such new fencing unless it is within an existing cultivated paddock. The idea that a lessee should be compelled by the Bill to obtain consent for an act required by another law is a nonsense.

A new item *Activities required by other legislation* should be added to the list of Permitted pastoral activities in Part 1.

The detail of Part 1 of Schedule 1AB – permitted pastoral activities

The extent of our comments indicates that this whole approach is flawed and needs a fundamental re-think.

Primary and indeed secondary legislation is not the place for this manner of prescription. It is far better suited to an agreed protocol or standard which can flex and adapt to changing circumstances. The Accord stands ready to work with the Commissioner on such a protocol.

The following specific comments are intended to highlight the extent of deficiencies rather than endorse the overall approach.

Clause	Issue	Recommendation
1	**Control of invasive exotic pest plants** This provision highlights the absurdity of the 'command and control' approach of the Bill. The photos included in this submission highlight two instances in which a lessee is prohibited from	 This paragraph needs a complete re-think. The photos appearing at the beginning and end of this Part 4 highlight the absurdity of the Bill's drafting. Is it really Parliament's intention that a consent should be required for the removal of gorse and wilding pines – or indeed any invasive exotic pest plants – in cases where the leaseholder is unable to satisfy an unreasonable set of conditions?

	removing a gorse bush or wilding pine without consent. In effect they become protected species. Who could possibly imagine that the precise measures provided for by this section are capable of any practical implementation? Imagine a lease of 15,000 hectares. There are two separate and distinct areas of 25 hectares and 15 hectares of gorse and broom which they wish to control (and indeed are obliged to control under the terms of the lease). First, this paragraph implies a requirement that the lessee must identify all indigenous animals and plants which might be affected by the control measure. Indigenous plants present some (but probably manageable) challenges, but the lessee is unsure what indigenous insects and other organisms might be vulnerable to by-kill. Even micro-organisms could be captured. In effect the paragraph requires an ecological assessment of the proposed area of control. Second, how is the 200m2/hectare to be calculated? How is the lessee to define the total area of clearance in order to determine the calculation? Third, the lessee must confirm whether the gorse and broom comprise not less than 90% of all vegetation cover but is unsure whether this is to be measured by leaf surface area, vegetative volume, species or all three. How is the 90% to be measured. In some parts, the gorse is dense, in other parts not so dense. Are these separate areas? Should she start again?	If so, these plants are effectively granted protected status, as the time and costs of a consent will not be justified

	Fourth, only 25 hectares can be done in any five year period. The lessee is therefore prevented from doing further weed control work in discrete areas of the property Fifth, is the lessee required to take account of weed control undertaken within the previous five years and recalculate the areas involved? Sixth, in making these calculations is the lessee required to take account of areas of adjacent freehold owned by that lessee and subject to the contemporaneous weed control programme? The cumulative effect of these absurd paragraphs is to oblige the lessee to obtain consent, at a cost, to undertake this clearance in order to resolve these uncertainties. Consent for an activity that is required by the lease! If the lessee controls the gorse and broom on the leased portion of their property without consent, they commit an infringement offence against the Act. The same activity is permitted – in fact, encouraged, on freehold land. How does adding cost and complexity to the control of invasive exotic pest plants enable better environmental outcomes?	
2	**Any other invasive exotic pest plant control which does not involve associated indigenous by-kill**	**Reconsider**

	There is an inevitability that indigenous species will be present in almost any soil sample taken. Lichens are expressly included, but so too (by natural principles of interpretation) all invertebrates and microscopic organisms (some of which may not yet have been identified and classified by science). The absence of any kind of materiality threshold makes this provision absurd. Even then, how is this by-kill to be measured	
3	**Curtilage** See comment above	See recommendation above
4	**Soil Disturbance (with an appropriate volume of area limitation)** What is an appropriate volume limitation? What is an appropriate area limitation? Who decides? The Bill is silent. Will the Commissioner or Minister decree the acceptable hole dimensions for a dead possum and those for sheep? What will happen following a snow event causing multiple deaths? Is the Government expecting lessees to apply for consents to bury multiple animals?	**Reconsider**

	Is there going to be a limit on how deep a long drop can be dug at a remote musterer's hut? Or is it a case of the deeper the better? Does the Commissioner really need to consent to the planting of a mixture of *chionochloa rigida*, *c rubra, cordyline australis* and *pseudopanex crassifolius* outside the woolshed (this activity being prohibited by the soil disturbance rule and the gardening permission only applying to curtilage)? Is it really proportionate also to prohibit such plants if they are to be sourced as seedlings from elsewhere on the lease (because this would involve soil disturbance)? Surely that would be inconsistent with the requirement to use local seed for riparian planting?	
5	**Fencing within existing cultivated paddocks** Under paragraph 4 a lessee may dig a post hole outside a cultivated area but is not allowed to run wires between those poles and create a fence, because this paragraph only permits fencing within a cultivated paddock.	**Reconsider**
6	**Riparian planting** The requirement for local seeds is conceptually sound but uncertain. What qualifies as 'local'? Uncertainty as to what qualifies will mean riparian planting will not occur.	**Reconsider**

	Note also, that the Bill will prohibit the use of seedlings (as opposed to seeds) because of the prohibition on soil disturbance. Why would local seedlings be prohibited? The Bill accordingly has the perverse effect of inhibiting activities most would accept as desirable	
7	**Clearing wind-felled trees** The prohibition on sale or off-farm commercial use is already covered by other general legislation. It need not be repeated here.	**Delete exceptions**
8	**Laying of water pipes in existing cultivated areas** The lessee is permitted to lay a water pipe within existing cultivated areas but is not permitted to establish a new trough within that same area at the end of the pipe (because that falls within the scope of a discretionary activity (*water storage infrastructure* in paragraph 2(m) of Part 2). Just what does Parliament think the water pipe is to be used for within such areas? This seems to be at odds with animal welfare considerations, particularly given the requirements to prevent stock accessing waterways for water.	**Make provision for the construction of tanks and troughs within such areas**
9	**Laying underground infrastructure** The requirement that there is absolutely no clearance of indigenous vegetation means that this permission has no practical utility.	**Reconsider**

	There will inevitably be some small seedlings of indigenous vegetation. As indigenous vegetation also includes lichens indigenous to the ecological region of the lease, each lessee will require a prescriptive list of such lichens for their lease and be able to identify them.	
12	**Maintaining existing drains, water races or culverts** Lessees are being separately required to prevent stock accessing waterways for water but are prevented from establishing a new water trough The phraseology does not allow for replacement (as opposed to maintenance) of existing infrastructure at the end of its life	**Reconsider**
17	**Maintaining any other existing consented activity as provided for in section 8(3)** As discussed separately this provision severely limits the rights of lessees to the use of the lessees' existing improvements and is effectively an appropriation of property rights	**Clarify that the rights to all existing improvements are retained – including the right to maintain, repair and replace**
18	**Repair existing fencing within existing footprint** This ignores the reality of farming in the high country with regular flood events and shifting watercourses	**Reconsider**

Activities which are not covered by the list of permitted activities, but which should be included without controversy:

- Reasonable response to natural events such as snow, wind, flood, fire and earthquake
- Burying or burning of domestic household rubbish
- Fencing required by regulation of general application within the territorial district
- Activities required by any law or by the terms of the lease itself
- Lighting of fires for cooking and camping purposes – subject to any prevailing regional restrictions

Part 2 of Schedule – discretionary pastoral activities

Clause	Issue	Recommendation
2(b)	**Burning vegetation**	See comments above and the need to rationalise along the lines of the Land Act 1948
2(d)	**Felling exotic timber under section 108** The removal of exotic plantations is to be a discretionary activity, notwithstanding that there may have been a consent to harvest given at the time that the plantation was established. The provision is inconsistent with section 100 which expressly provides that the Commissioner's consent is not required in certain circumstances *provided that the consent of the Commissioner shall not be necessary where any timber or tree is required for any agricultural, pastoral, household, roadmaking, or building purpose on the land comprised in the lease or licence, or has been planted or purchased by the lessee or licensee.*	This provision needs to be amended so that the provisions of section 100 are replicated within this Bill and the old section 100 repealed
2(m)	**Constructing water storage infrastructure** This is too broad. A 10,000 litre storage tank collecting water from the woolshed will require consent	**Reconsider** which activities should be permitted (such as replacing existing water storage infrastructure and structures for stock water)

	This also seems to be at odds with animal welfare considerations, particularly given the requirements to prevent stock accessing waterways for water.	

Example of soil disturbance in response to an adverse weather event (necessary to rescue stock)

Example of a fence damage from flooding the repair of which would require a consent

Example of an existing water tank – replacement of which would require the Commissioner's consent under Schedule 1AB, Part 2, Section 2(m))

Part 4 of Schedule – definitions of pastoral activities

Definition	Issue	Recommendation
Clearing vegetation	Extends to exotic plants Includes grazing, lawn mowing and other similar activities	Exclude clearance of exotic vegetation Clarify by an addition to paragraph(c) that this excludes any activity on curtilage
Cultivated paddock	Uncertain scope of 'currently cultivated' Has the potential to deprive lessees of heir improvement of the land See the discussion of the cycle of farming in Part 2	Amend (b) so that historical cultivation is within the definition not excluded
Curtilage	Uncertain	Amend to read *means the area surrounding a dwelling used for primarily domestic and household purposes and the area surrounding existing farm buildings used for stock management purposes rather than grazing*
Drain	The term 'predominantly flat' is inherently uncertain – who makes this determination (noting that flat land will not drain. All constructed drainage requires some degree of slope	Re-draft to take account of natural behaviour of water to run down hill
Invasive exotic pest plants	Uncertain	Amend to provide bright line test by reference to an independent external data base which can adapt overtime to re-classification of plants
'Pastoral land'	While defined in the main body of the Act (section 2) Parts 1 & 2 of	Include new definition 'Pastoral land' in Parts 1 and 2 of this Schedule excludes any curtilage'

	Schedule 1AB should adopt a refined definition. This will allow activities within the curtilage of pastoral land which might otherwise not be permitted.	

This wilding pine is to be protected by the Bill