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Mr Gerald Fitzgerald
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Dear Gerald

High Country Accord Trust – Crown Pastoral Land Reform Bill 30–2 (2020)

I refer to your instructions of 20 July 2021 to advise the trustees of the High Country Accord on the constitutional and public law implications of proposed clause 21A of the Crown Pastoral Land Reform Bill.

I am instructed to provide my advice in two stages. This opinion provides **Stage 1** advice: namely, on the constitutional implications and justification of subcl (2A) of clause 21A of the Bill. My **stage 2** advice will set out the options open to Crown pastoral leaseholders.

I now set out my **stage 1** advice.

Yours sincerely

Philip Joseph

Introduction

1 Mr Gerald Fitzgerald, of Fitzgerald Strategic Legal, has issued instructions for me to advise the High Country Accord Trust. The Trust represents the interests of holders of Crown pastoral leases of the South Island High Country.

2 I am asked to advise on the constitutional and public law implications of cl 21A of the Crown Pastoral Land Reform Bill 307–2 (2020) (**the Bill**). The Bill was promoted in response to concerns for the maintenance and enhancement of indigenous biodiversity on Crown Pastoral Land. It was introduced following feedback on a consultation document first published in January 2019.

3 Clause 21A was inserted in the Bill by the Environment Committee (by majority vote) when it reported back to the House of Representatives on 6 July 2021, following extensive public submissions. The Bill has yet to be set down for second reading.

4 Clause 21A proposes the amendment of s 89 of the Land Act 1948 (**the Act**). Section 89 provides that the Commissioner of Crown Lands must consent to any dealing with any Crown lease or licence (subject to a number of specified exceptions). Subclause (2A) of cl 21A provides (emphasis added):

> "If the land under the lease or licence is pastoral land, the Commissioner *must not consent* to the transfer, sublease, or other disposal unless satisfied that the applicant has made reasonable endeavours to enhance public access to the land."

5 I am instructed to provide my advice in two stages. This opinion provides **Stage 1** advice: namely, on the constitutional implications and justification of cl 21A inserted by the Environment Committee pending the Bill's second reading. My **stage 2** advice will set out the options open to stakeholders. This advice will identify rights of recourse that might be pursued at the Bill stage and subsequently upon enactment.

Executive summary

6 Crown Pastoral leases confer on leaseholders the right of exclusive possession. This right is not a self-interested assertion of privacy; the right is *fundamental* to the effective operation of a farming business. There is no requirement under pastoral leases that lessees grant public access. However, the practical legal effect of the proposed subclause (2A) is to impose *a duty* on the Commissioner to require leaseholders to enhance public access to pastoral leases. This duty is in clear conflict with leaseholders' right of exclusive possession.

7 The Explanatory Note to the Bill lists (at page 1) six statutory purposes, none of which identifies promoting public access to Crown pastoral land. Subclause (2A) is an outlier that

was not contained in the Bill as introduced. The Bill should not now be used as a vehicle to promote public access to Crown pastoral land at the expense of leaseholders' property rights recognised at law.

8 Subclause (2A) of cl 21A of the Bill is constitutionally objectionable on two counts: (i) it constitutes a regulatory "taking" of the right of exclusive possession without compensation, and (ii) it will be enacted into law in breach of proper parliamentary process.

9 Subclause (2A) amounts to a regulatory taking of property without compensation. The provision inherently deprives pastoral leaseholders' of their rights of exclusive possession and quiet enjoyment. The provision also fundamentally alters leaseholders' right to transfer pastoral leases for valuable consideration.

10 The position under English law governing the confiscation of private property is the same as under New Zealand law. In *Central Control Board (Liquor Traffic) v Cannon Brewery Ltd* [1919] AC 744 (HL) at 760, the House of Lords disclaimed any Crown prerogative to seize land without payment of compensation. Their Lordships stated:

> "[I]t is contrary to a principle enshrined in our law, at least since the date of Magna Carta, to suggest that an executive body … can claim, under the prerogative, to confiscate, for the benefit of the Crown, the private property of subjects."

11 Under United States law, a deprivation of private property rights through state regulation is expressly recognised as a "taking" under the 5th Amendment. A "taking" automatically triggers rights to just compensation.

12 The same principles that inform United States' regulatory takings law form part of the rule of law as that concept is understood under New Zealand law. Section [4.4] of the Legislation Design and Advisory Committee's *Legislation Guidelines: 2018 Edition* is titled, "Respect for property". Section [4.4] expressly acknowledges the concept of a regulatory taking under New Zealand law.

13 Crown pastoral leaseholders have a legally-recognised bundle of property rights and interests under their pastoral leases. The right of exclusive possession underpins the farming enterprise and is the most fundamental right under Crown pastoral leases.

14 The common law right to security and protection of property is an ancient right that can be traced to the Magna Carta (1215). The deprivation of the right is a constitutional privation that is fundamentally in breach of the rule of law. The constitutional affront is no less objectionable because the taking is effected by legislation (a "regulatory taking"). Indeed, it is exacerbated as the Crown is taking a right that the Crown itself granted under each pastoral lease.

15 Subclause (2A) was introduced at select committee stage without prior notice to or consultation with Crown pastoral leaseholders. It is inappropriate parliamentary process to introduce legislation that would undermine existing property rights recognised at law, without (at the very least) engaging in prior consultation with affected stakeholders and negotiating just compensation.

16 The proposed duty to enhance public access to leasehold land will be a compounding one which will progressively diminish the property rights of leaseholders. It will be a condition of transfer of a Crown pastoral lease that each leaseholder must enhance public access over the land. Each transfer will be contingent on the leaseholder having enhanced public access beyond that which existed at the commencement of the lease. This will be so even where the transfer may simply entail the inter-generational passing down of property within families.

Effect of subclause (2A) on property rights

17 Subclause (2A) will fundamentally compromise the existing rights of Crown pastoral leaseholders. The Regulatory Impact Statement accompanying the Bill (https://www.linz.govt.nz?crown-property/crown-pastoral-land/crown-pastoral-land-management/high-country-advice) explains the rights of lessees under Crown pastoral leases (at page 6):

> "The leases have 33-year terms, but are perpetually renewable which means that the leaseholder enjoys exclusive possession of the land indefinitely. The leases provide a right to pasturage over the land and a right to quiet enjoyment."

18 In *New Zealand Fish and Game Council v Attorney-General* HC CIV 2008-485-2020 at [83], the High Court affirmed that the leases "create an interest in the land that can be assigned, mortgaged, surrendered or forfeited". The Court further confirmed (at [83]):

> "The lessee farmer, subject to very little exception, is entitled to renewals of this lease forever, on the same conditions and terms … legal or exclusive possession is thereby given to the lessee."

19 The Regulatory Impact Statement acknowledges the leaseholders' rights to: (i) perpetual renewal of the lease; (ii) exclusive possession of the land; and (iii) quiet enjoyment of the land. The report of Land Information New Zealand (**LINZ**) to the Environment Committee likewise acknowledged that "the leaseholder holds the rights to exclusive possession and quiet enjoyment of the land" (*Crown Pastoral Land Reform Bill: Departmental Report to the Environment Committee*, May 2021, LINZ at 22). These rights create a valuable property asset in pastoral leases.

20 However, notwithstanding those acknowledgements, subcl (2A) promises to diminish the value of that asset by removing the rights of exclusive possession, quiet enjoyment and unhedged right of transfer of Crown pastoral leases.

21 Subclause (2A) will fundamentally alter the legal incidents of Crown pastoral leases. Leaseholders wishing to transfer their lease must surrender their rights of exclusive possession and quiet enjoyment. They must persuade the Commissioner, as a condition of transfer, that they have made "reasonable endeavours to enhance public access to the land" (subcl (2A)). Unrestricted public access removes the rights of exclusive possession and quiet enjoyment.

22 The duty to enhance public access is a compounding one. As a condition of transfer: leaseholder 1 must enhance public access; leaseholder 2 must do likewise, as must leaseholder 3, leaseholder 4 and so on. Whilst the public access required by the Commissioner at transfer 1 might seem innocuous, each successive transfer will broaden the public's right of access to the point where it will destroy the incidents of exclusive possession and quiet enjoyment. Increasing rights of public access will transform pastoral leases into something approximating to a mere licence.

23 The thinking behind subcl (2A) is muddled, unconvincing and contradictory. In LINZ's departmental report to the Environment Committee, it recorded the Government's position thus (at page 22):

> "The Government's intention is that this Bill should reflect leaseholders' rights to exclusive possession and quiet enjoyment of the land. LINZ's view therefore is that no changes should be made to the Bill that impact on those rights."

24 In the next breath, LINZ acknowledged (at page 22) that "there is strong interest in increased public access to and through Crown pastoral leases". LINZ specifically alluded to providing "more explicitly for public access to Crown pastoral land to be considered when a lease is transferred". LINZ then recommended verbatim what is now subcl (2A). Remarkably, LINZ concluded that such a clause "would not affect *the transferee's* right to exclusive possession or quiet enjoyment" (emphasis added).

25 It is difficult to comprehend LINZ's reasoning. One might acknowledge that the rights of the current leaseholder (the person divesting him/herself of the lease) would not, in any future sense, be adversely affected. But LINZ's conclusion addresses *the transferee*, "the person to whom a thing is transferred" (*The Chambers Dictionary* (Charles Harrap Publishers Ltd, Edinburgh, 1993)). According to LINZ, the rights of exclusive possession and quiet enjoyment exercised by the transferee (the new leaseholder) would not be affected. This conclusion contravenes LINZ earlier reasoning and the Government's stated position outlined in para [23] above.

26 A pernicious feature of subcl (2A) is the effect it will have on the value of Crown pastoral leases. Exclusive possession and quiet enjoyment are valuable assets, the removal of

which will seriously diminish the value of pastoral leases when they come to be transferred.

27 Another pernicious feature concerns leaseholders' rights freely to alienate their property interest. Subclause (2A) makes that right conditional upon the Commissioner's consent. The Commissioner is compelled *not* to consent to a transfer "unless satisfied that the applicant has made reasonable endeavours to enhance public access to the land". Any belief the Commissioner may arrive at under subcl (2A) would need to be objectively supported. Nevertheless, the wording of the provision is unsatisfactorily vague. Reasonable people might reasonably differ over what amounts to "reasonable endeavours". The meaning of "enhance public access" is also unsatisfactorily vague. It can be expected that subcl (2A), if enacted, would become a fertile source of litigation in applications for judicial review.

28 It is constitutionally wrong to make existing property rights, recognised at law, contingent upon another's belief as to "reasonable endeavours". The *Legislative Guidelines: 2018 Edition* promulgated by the Legislation Design and Advisory Committee provide (at page 24) that a "rigorously fair procedure is required" if the Government is to take another's property. Subclause (2A) does not meet that threshold.

29 Subclause (2A) redefines the legal basis on which Crown pastoral leases were entered into. Where once pastoral leaseholders held a valuable property asset, they will, under subcl (2A), hold one that is entirely contingent and of diminished value. The asset in the property right becomes valueless if a leaseholder cannot secure the commissioner's consent to a transfer. Decisions to withhold consent will invariably invite challenge through the courts.

30 Subclause (2A) ostensibly operates prospectively to regulate future lease transfers, but it has damaging retrospective effect for existing Crown pastoral leaseholders. The property rights they acquired under their leases, under the law as it then applied, will be severely compromised and their value diminished. The retrospective effect of the provision for existing leaseholders is damning from a constitutional perspective.

Regulatory takings law

31 The concept of a "regulatory taking" under United States' law dates from the United States Supreme Court decision in *Pennsylvania Coal Co v Mahon* 260 US 393 (1922). A regulatory taking occurs where the government diminishes the value of a property right by means of legislation or other regulation. Regulatory takings law draws on Hohfeld's concept of property, as comprising a bundle of abstract interests of which each is a quantifiable asset (WN Hohfeld *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1919) at 71 et seq). For Hohfeld, a taking was the deprivation of the rights and interests that attached to the object or land, rather than the physical appropriation of it.

32 Deprivation of a property right need not be "physical" to be a *taking*. The rights of exclusive possession, enjoyment and conveyance of the object/land are the asset (the property right). Regulatory interventions that destroy or impair those rights will constitute a *taking*. In *Pennsylvania Coal* the Supreme Court held that, if a regulatory intervention "goes too far", it will amount to a taking triggering rights to just compensation (at 415 per justice Holmes).

33 In the United States, the 5th Amendment "takings clause" guarantees the right to compensation for the State's exercise of eminent domain (compulsory acquisition of private property for public purposes). The 5th Amendment declares that no person shall be "deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation".

34 American takings law treats eminent domain and the right to compensation as inseparable: "that the one [the power to take] was inseparably connected with the other [the duty to compensate] that they may be said to exist, not as separate and distinct principles, but as parts of the one and the same principle" (*Chicago, Burlington & Quincey Railroad Co v City of Chicago* 166 US 226 (1986) at 238 per Justice Harlan delivering the decision of the Court).

35 Unlike in other jurisdictions, New Zealand lacks any constitutional guarantee to compensation for expropriation of private property (including regulatory takings). Nevertheless, the right to compensation is a universal constitutional norm. In *Chicago, Burlington*, the Supreme Court held that the right to compensation was one "founded in equity" and "laid down as a principle of universal law" (at 236 per Justice Harlan). The right can be traced to the Magna Carta guarantee that "[n]o freeman shall be … disseised of his Freehold … but by the lawful Judgment of his Peers, or by the Law of the Land" (the phrase "the Law of the Land" became "by due process of the law" in later iterations of the Magna Carta). Not to make reparations for the exercise of eminent domain (whether by way of regulatory takings or otherwise) offends the notion of justice embodied in the words "the law of the land"/"due process of the law".

36 From feudal times, the English Parliament provided for payment of compensation where its statutes authorised the taking of private property. Sir William Blackstone's writings elevated that practice into a binding constitutional principle. Blackstone wrote that the English Parliament "indeed frequently does" pass statutes to expropriate property, but only with "a full indemnification and equivalent", or "a reasonable price", to compensate for the subject's loss (Sir William Blackstone *Commentaries on the Laws of England* (1765), Vol 1 at 139).

37 Two hundred years after Blackstone, the House of Lords observed that Parliament and the courts had been scrupulous to observe that "title to property *or the enjoyment of its possession* was not to be compulsorily acquired unless full compensation was afforded in its place" (*Belfast Corporation v OD Cars Ltd* [1960] AC 490 (HL) at 523 (emphasis added)).

38 Clause 6 of Part 1 of Schedule 1 of the Bill amplifies the constitutional concern. Clause 6 is titled "No compensation payable" and legislates away the right to compensation. It provides that no compensation is payable by the Crown for any loss or other adverse effect on or under any Crown pastoral lease arising from the enactment or operation of the amending Act. The taking of private property by legislative fiat, specifically without compensation, violates the social contract between citizen and State, and offends the constitutional principle of the rule of law.

Final observations

39 Subclause (2A) proposes "bad" law. It should never have been incorporated in the Bill. It legislates away the valuable property rights of Crown pastoral leaseholders, without notice or consultation, and without rights to compensation.

40 The Legislation Design and Advisory Committee (**Committee**) is a government committee tasked with producing legislative guidelines "for assessing whether draft legislation conforms to accepted constitutional and legal principles" (*Cabinet Manual 2017*, Cabinet Office, Department of Prime Minister and Cabinet, Wellington, at [7.38]). Successive Cabinets ritually endorse the Committee's *Legislative Guidelines* at the commencement of their term. The 2018 edition states (at 24): "New legislation should respect property rights … People are entitled to the peaceful enjoyment of their property". Subclause (2A) has been added to the Bill in blatant disregard of the *Legislative Guidelines*. No satisfactory explanation has been given to justify the departure from "accepted constitutional and legal principles" (*Cabinet Manual 2017* at [7.38]).

41 The final irony is that subcl (2A) is superfluous. This is so for two reasons: first, the Bill (as introduced) provides an effective mechanism to promote public access to Crown leasehold land. Clause 19 proposes to amend s 24 of the Land Act 1948, which provides for the powers and duties of the Commissioner of Crown Lands. Clause 19 would impose a new duty on the Commissioner to support the New Zealand Walking Access Commission (NZWAC) in achieving its public access objective. It is envisaged the Commissioner would play a facilitative role in negotiating with the NZWAC and pastoral leaseholders to promote public access rights (Explanatory Note to the Bill at page 7)

42 Secondly, public access to Crown pastoral land is already made freely available. The trustees of the High Country Accord instruct me that Crown pastoral leaseholders – with few exceptions – grant public access to and over their leasehold land. Leaseholders will readily grant reasonable requests to access their land. Fishers, hikers and outdoor community groups all prosper from the access made available.

43 The long term detrimental effect subcl (2A) will have on pastoral leaseholders will far outweigh any minimal *practical* benefit the subclause may be perceived to have. The sensible recourse is remove subcl (2A) from the Bill.

44 Whilst my Stage 2 advice will deal more comprehensively with the question of recourse and remedies, I think in the first instance this legislation should be referred to the Legislation Design and Advisory Committee (to which I have referred above) and to the Rule of Law Committee of the New Zealand Law Society. The latter Committee is established to fulfil the fundamental duty of New Zealand lawyers to uphold the Rule of Law and I have little doubt it would review this legislation. As a member of that Committee, I would need to recuse myself from its deliberations.

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