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Submission on Crown pastoral land proposed regulations and standards

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PART 1

Introduction

Herenga ā Nuku Aotearoa Outdoor Access Commission (formerly the New Zealand Walking Access Commission Ara Hikoī Aotearoa) is the Crown agent responsible for providing leadership on outdoor access issues.

Our role is to advise on and advocate for free, certain, enduring, and practical access to the outdoors.

We administer a national strategy on outdoor access, including tracks and trails. We map outdoor access, provide information to the public, oversee a code of responsible conduct in the outdoors, help to resolve access issues and negotiate new access.

Herenga ā Nuku has a team in Wellington and a network of regional field advisors. An independent board governs our work. Our governing piece of legislation is the Walking Access Act 2008.

The primary purpose of the Walking Access Act 2008 is 'to provide the New Zealand public with free, certain, enduring, and practical walking access to the outdoors (including around the coast and lakes, along rivers, and to public resources) so that the public can enjoy the outdoors'. There is a special focus on access to water bodies and public conservation land.

Herenga ā Nuku plays a key role in negotiating, establishing and improving outdoor access for New Zealanders. This includes making people and organisations aware of public access

locations and ensuring that access endures over time. Our mandate includes all forms of public access, including on/by foot, bike, horse and vehicle.

Consultation Process

Herenga ā Nuku Outdoor Access Commission (as the New Zealand Walking Access Commission) will now be referenced in the Land Act 1948, as amended by the Crown Pastoral Land Reform Act 2022.

The Commissioner of Crown Lands will have the power and the duty to support the Commission as far as practicable in meeting its public access objective where that relates to pastoral land (section 24(1)(ia)). Unfortunately, this support has not yet extended to any specific consultation on the proposed regulations and standards.

Herenga ā Nuku Outdoor Access Commission expresses deep concern that as the Crown agent responsible for providing leadership on outdoor access issues, and with the Commissioner to have the power and the duty to support the Commission as above, it was treated as a member of the public during the current consultation process.

Recommendation 1

Herenga ā Nuku Outdoor Access Commission recommends that the Commissioner of Crown Lands consult specifically and directly with the Commission before Crown pastoral land regulations and standards are finalised.

Principles

In respect to public access on pastoral lease land, Herenga ā Nuku Outdoor Access Commission acknowledges that a pastoral lease gives the holder exclusive possession of the land, and the right to graze the land. A pastoral lease also gives the holder the right to quiet enjoyment of the lease.

The Commission also acknowledges that historically most holders of pastoral leases have been generous in allowing recreational access across their land.

Herenga ā Nuku Outdoor Access Commission notes that there may be various forms of public access that may intersect or adjoin pastoral lease land. Most commonly this includes legal roads, both formed and unformed, and marginal strips. These parcels are not part of a pastoral lease and members of the public have a legal right of access over them.

PART 2

Regulations - comments

Recreational attributes or characteristics are no longer recognised as an inherent value to be considered under the Crown Pastoral Land Act 1998. Herenga ā Nuku Outdoor Access

Commission maintains that public access per se is a legitimate matter for the Commissioner to consider when assessing applications to undertake a discretionary pastoral activity or for a commercial recreation permit.

Unformed legal roads and marginal strips for example, are not a part of a pastoral lease but are often not separately identified by lessees. Public access on these areas can be adversely affected by activity on the adjoining pastoral lease. The Commissioner will be able to consider such cross-boundary effects (Crown Pastoral Land Act 1998, section 10 (4)(e)). Having such public access identified and acknowledged by the lessee would improve awareness and prevent or mitigate potential adverse effects on public access.

There may also be traditional access routes across a pastoral lease where access by permission has historically been available. Discretionary pastoral activity, and commercial recreation activity in particular, can adversely affect such traditional access. While such access may have been by permission from the lessee, advance notice of potential adverse impacts would allow for an independent approach to be made to the lessee to attempt to negotiate suitable future access.

By considering public access as above the Commissioner would be supporting Herenga ā Nuku Outdoor Access Commission in meeting its public access objectives on pastoral land.

Recommendation 2

Herenga ā Nuku Outdoor Access Commission recommends that regulations made under **section 100R(1)(a)** require the applicants for any consent to undertake a discretionary pastoral activity or for a commercial recreation permit, to provide the following information;

- A plan showing any legal public access in the immediate vicinity
- An assessment of potential adverse effects of the activity on any legal public access in the immediate vicinity
- A description of any traditional access routes in the immediate vicinity, and how such access may be affected by the activity.

PART 3

Standards - comments

Herenga ā Nuku Outdoor Access Commission has no comments on the Draft Chief Executive Crown Pastoral Land Standard 2022 and will focus on public access matters associated with the Draft Commissioner of Crown Lands Standard on Easements, Transfers and Subleases affecting Crown pastoral land.

There are several questions unanswered by the draft standard, and a greater degree of explanation would assist. The Commission recognises that there are limitations to the degree of detail a standard can contain, and in some circumstances would support the subsequent development of guidelines, to provide this greater detail.

Easement applications

The impacts of an easement granted over Crown pastoral land are largely dependent on the nature of the activity the easement is granted for. Such activities could range for example from a poled walking route with minimal if any soil disturbance, to the construction of a formed road with significant vegetation removal and earth disturbance. Given these significantly different impacts, a 'one size fits all' approach to requirements for an easement application would seem to impose unnecessary requirements on an applicant for an easement where the activity will have minimal effect (or minimal additional effect e.g. tramping access on an existing farm track) on inherent values or the soil.

Section 6 of the draft standard needs to provide for easement applications where the activity will have significant effects. However, it also needs to reflect the requirements where an activity will have minimal effects. While subsection (1)(c) does provide that the details required are 'where relevant', there is no indication of what detail may be relevant in which situation. Practically, this is likely to result in administrators simply requiring at least all the identified details, regardless of the nature of the activity the easement is being sought for. Such distinction may not be possible in a standard but does need to be made to assist both applicants and administrators.

Recommendation 3

Herenga ā Nuku Outdoor Access Commission recommends that the standard (or associated guidelines) clearly indicate the different level and extent of detail required for easements where the proposed activity will have minimal if any adverse effects, and those with where the proposed activity will have identifiable adverse effects.

Section 60(5) of the Land Act 1948 will effectively enable the Commissioner to consider anything they think relevant when determining whether to grant an easement over or under pastoral land. The draft regulations are silent on what the Commissioner may consider. This provides the Commissioner with flexibility, but it also introduces some uncertainty for applicants. A significant uncertainty is how the Commissioner may choose to view the potentially competing objectives of the applicant and the lessee. Section 4 of the Crown Pastoral Land Act 1988 provides among other things for the ongoing pastoral farming of pastoral land. While there is no definition of pastoral land, how will the Commissioner determine whether an easement might reasonably restrict the pastoral farming of the land? Or will this effectively be left to a valuer's assessment of compensation?

The standard or associated guidelines should provide an outline of how the Commissioner will determine whether to grant an easement. An applicant appears to need to show that an easement is reasonably necessary for achieving their objectives. If a lessee opposes the granting of an easement, they should presumably need to show how an easement would unreasonably restrict the farming of the land, or their right to quiet enjoyment of the lease?

Recommendation 4

Herenga ā Nuku Outdoor Access Commission recommends that a new subsection (2) be added to section 8 of the standard, to read;

(2) Where a copy of a written agreement with the relevant lessee(s) or licensee(s) has not been provided by the applicant, the Commissioner will seek a written statement from the relevant lessee(s) or licensee(s), to include;

(i) Whether or not they agree with the proposed easement, and if not,

(ii) how the easement would unreasonably restrict the farming of the land, or their right to quiet enjoyment of the lease.

Recommendation 5

Herenga ā Nuku Outdoor Access Commission recommends that the standard (or associated guidelines) clearly indicate the process the Commissioner will follow when determining whether to grant an easement.

Transfer and sublease applications

The draft standard has not sufficiently addressed how the Commissioner will be able to determine whether any past request for public access over the land has been unreasonably refused. Without greater structure and specificity in the standard, subsection 89(2A) Land Act 1948 will have little or no practical effect.

The lessor of pastoral leases (i.e. the Commissioner of Crown Lands) is the logical recipient of information regarding refusals to grant access over land under a pastoral lease, or licence. The lessor's agent, the Crown agency, should be the recommended and promoted collector and documenter of alleged refusals to grant access over land under a pastoral lease.

The Commissioner, or Crown agency, should determine what form of evidence is required to support, or deny, a claim of access having been unreasonably refused. The required form of evidence should be promoted to lessees and outdoor access groups to assist their understanding of the process, and to assist the Commissioner in any determination of whether access has been unreasonably refused.

Recommendation 6

Herenga ā Nuku Outdoor Access Commission recommends that section 10 of the standard be amended to insert a new section (2) before the current section (2) which would become section (3). The new inserted section (2) to read;

(2) For the purposes of subsection 89(2A) of the Land Act, to determine whether any past request for public access over the land were reasonably refused;

(a) the Commissioner will require the Crown agency to;

(i) actively seek and record any refusals to grant public access over the relevant land, and

(ii) promulgate an appropriate form of evidence to support, or deny, a claim of access having been unreasonably refused.

Herenga ā Nuku Outdoor Access Commission supports the documented negotiation process (Schedule 2) for ensuring that future access requests are not unreasonably refused.

PART 4

Conclusions

Herenga ā Nuku Outdoor Access Commission asks that the six recommendations made be accepted and adopted.

Herenga ā Nuku Outdoor Access Commission looks forward to continuing a good working relationship with the Commissioner of Crown Lands, receiving their support as appropriate, and assisting them as required.



Ric Cullinane

Te Tumuaki - Chief Executive

Herenga ā Nuku Aotearoa Outdoor Access Commission