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Submission on options to streamline processes for reclassification and disposal of stewardship land

Introduction

1. This is the Environmental Defence Society's (EDS) submission on options to streamline processes for reclassification and disposal of stewardship land under the Conservation Act 1987 (the Act), as set out in the Department of Conservation's (DOC) discussion document dated November 2021 (Discussion Document).[1]

2. EDS is an independent not-for-profit organisation conducting interdisciplinary policy research and litigation. It was established in 1971 with the purpose of improving environmental outcomes in Aotearoa New Zealand.

3. EDS is familiar with the complex challenges facing management of the conservation estate. DOC will be aware of EDS's review of the conservation system published in a report entitled "*Conserving Nature: Conservation Reform Issues Paper*".[2] That Report identifies the key issues, problems and points of tension that exist within the current system and includes a chapter on the specific management challenges facing stewardship land.[3] EDS is currently undertaking research for DOC on future options for conservation system reform.

4. The reform options set out in the Discussion Document arise from the Government's overarching objective to reclassify stewardship land within five years. That ambitious goal assumes that the current statutory framework gives adequate protection to conservation land and resources in Aotearoa New Zealand. EDS does not agree. The current conservation categories and purposes lack ambition and do not offer sufficient protection to important conservation values. Reclassifying land

[1] Department of Conservation, 2021, *Stewardship land in Aotearoa New Zealand: Options to streamline processes for reclassification and disposal*, Discussion Document, Department of Conservation, Wellington. Available from www.doc.govt.nz
[2] D Koolen-Bourke and R Peart, 2021, *Conserving Nature: Conservation Reform Issues Paper*, Environmental Defence Society, Auckland. Available from www.eds.govt.nz
[3] Ibid, p 80-85.

at pace will not lead to improved conservation outcomes without broader, carefully considered, legislative reform.

General comments on legislative reform options

5. Read collectively, the reform options appear as a wolf in sheep's clothing. They are presented as low impact, low risk amendments to the Act which will result in significant efficiencies in reclassification and disposal processes. Practically, however, they represent a largely unjustified constraint on public involvement in important conservation decisions, with little to no benefit.

6. Most of the reform options set out in the Discussion Document are proposed to resolve what DOC perceives to be a key barrier to efficient reclassification and disposal of stewardship land: the need for public consultation. The proposals seek to limit public consultation by amending administrative processes within the Act. In reality, past delays appear to have resulted largely from non-legislative barriers, including a failure to prioritise the reclassification process in budget allocations and challenges associated with the assessment of stewardship land (i.e., surveying and values assessments).

7. The proposed legislative amendments would enable existing concessions to continue in circumstances where the effects of concessions on conservation values are inconsistent with the purposes for which the land is held under the Act. This approach is inconsistent with:

    - The conservation objectives that are expressly identified within the definition of "conservation" in the Act, which seek to protect the intrinsic values of conservation land and to safeguard the options of future generations in respect of natural and historic resources;

    - The Act's intention that concession privileges be amended to align with current contempory conservation objectives; and

    - The objectives of this legislative review, which are "ensuring DOC meets its wider obligations under conservation legislation and the Conservation General Policy" and "ensuring conservation values are adequately protected'.

8. Alternative approaches are available that would enable the efficient review of existing concession terms and prevent the extended continuation of concession privileges in respect of stewardship land.

9. Combined, the proposed reforms potentially create a 'fast-track' disposals process for stewardship land, where public involvement is curtailed and land can be disposed of in the absence of any statutory test. That is particularly so with respect to Option 4.1. Declaring all s 62 stewardship land to be held for conservation purposes may, at first glance, not appear that significant. But removing the statutory bar to disposal of s 62 land is significant. It means that stewardship land can be recommended for disposal, *en masse*, with limited public consultation in accordance with a disposal threshold test that, while currently robust, can be amended or revoked at any time under the Act.

10. The reforms also risk undermining the independence of the newly appointed national panels. The panels are advisory only, have no statutory decision-making powers, and are comprised of experts tasked with the specialist job of assessing stewardship land for reclassification or disposal. In an attempt to enhance efficiencies, the reform options propose giving the panels greater powers in relation to the public notification and submissions process (including hearings). Decisions about whether a submissions period needs to be extended, or whether a public hearing can be cancelled, may involve political or policy considerations; matters that should not concern the national panels in their independent expert advisory capacity.

11. The proposed legislative amendments do not squarely address the role of national panels. The purpose, functions, and processes of national panels are set by the Minister through terms of reference and can be varied "as the Minister thinks fit".[4] The current terms of reference for national panels are seriously lacking. No safeguards are provided in the proposed reform options or the terms of reference to protect against the panel considering, or giving weight to, the economic values of land in the assessment process. This is of concern because the current terms of reference direct national panels to prioritise the review of parcels of land that are identified as potential mining locations.[5] If new applications for access arrangements on stewardship land are sought before panels have completed their assessments, there is a risk that panels will adopt a narrow focus of the potential conservation values of the land. In some cases, where land is of relatively low value, the balance of conservation and economic values might be slight. Economic values are more readily quantifiable than intrinsic values, which could lead to their prioritisation in panel assessments. Stronger and clearer direction on the matters that can be assessed by national panels would promote transparency and ensure the economic values of land are not given undue consideration in the reclassification process.

Reform option 1: Improving consistency of public notification and submission processes

12. In line with a desire to 'streamline' the reclassification process, reform option 1 seeks to:

    - Reduce the minimum notice period for submissions from 40 working days to one month (Option 1.1); and
    - Allow the ability to decline a hearing on submissions (Option 1.2).

13. EDS does not support Options 1.1 or 1.2 for the following reasons:

    - There is no evidence that a 40 working day submission period or hearings result in delays or inefficiencies in the reclassification process;
    - Once implemented, reclassification outcomes are hard to change and will have long term implications for the conservation estate, so decisions need to be well informed and accurately made the first time round;
    - The reform options do not provide sufficient time for considered input into reclassification decisions;
    - The benefits of public input are not recognised by the reform options; and
    - The reform options are inconsistent with national conservation policies on public participation.

[4] Conservation Act 1987, s 56(1).

[5] Terms of Reference and Procedures for the Independent Expert National Panels to provide recommendations on the reclassification of stewardship land (dated April 2021) at [16].

14. Accordingly, EDS supports retention of the status quo submissions and hearing process (Option 1.3).

No evidence of delay or inefficiencies

15. The purpose of the reforms proposed is to simplify and modernise the Act to create a streamlined reclassification process, thereby reducing the cost and time associated with reclassifying stewardship land and disposing of it where appropriate. The Discussion Document does not provide any quantifiable evidence demonstrating that the current 40 working day submission period or hearings are causing significant delays or inefficiencies in the reclassification process. It is more likely that other processes (such as surveying the land, undertaking values assessments and consulting with tangata whenua (including via the Māori Protection Mechanism)) and a lack of funding are to blame. Indeed, these are the issues that are listed, in the Cabinet paper on improving the process for reclassification of stewardship land, to explain why DOC had not progressed its five-year plan to deal with priority sites:[6]

> *"30 The five-year timeframe in accordance with the plan has proven to be unrealistic. This is because the existing statutory process of reclassification has been slowed down by:*
> *30.1 the work not being a priority relative to other DOC work programmes;*
> *30.2 the volume of information required to ascertain the ecological, cultural, historic, economic, recreational and landscape values inherent in the land;*
> *30.3 the large area of stewardship land needing to be reclassified;*
> *complex surveying requirements and associated high costs; and*
> *30.4 the need for proper involvement of tangata whenua: iwi, hapū and whānau and local communities and engaging multiple times depending on the process requirements of the different Acts."*

16. Delays associated with public submissions or hearings are noticeably absent from the list of issues. Reducing public submission periods and declining hearings is unlikely to result in significant efficiencies in the reclassification process. In fact, it may actually have the opposite effect, and create delays (see below).

Reclassification outcomes will have long term implications

17. There is considerable public interest in conservation in Aotearoa New Zealand. Conservation provides for important public values such as:[7]

- The preservation and protection of natural and historic resources (including all animals, plants, ecosystems, natural landforms and landscapes, geological features, and cultural heritage);
- Maintaining the intrinsic values of natural and historic resources;
- Providing for the appreciation and recreational enjoyment of the public with regard to natural and historic resources; and
- Safeguarding the options of future generations with regard to natural and historic resources.

[6] Cabinet Paper "Improving the process for reclassification of conservation portfolio stewardship land" available from https://www.doc.govt.nz/globalassets/documents/about-doc/role/managing-conservation/stewardship-land-cabinet-paper-redacted.pdf

[7] Conservation Act 1987, s 2(1), definition of "conservation"

18. The reclassification process will have long-term consequences for these conservation values. There are multiple categories into which stewardship land could be reclassified, with each providing different levels of protection, public access and use of the land. The reclassification could also result in disposal of the land. Disposed land is no longer held for conservation purposes as it has been removed from the conservation estate. Once implemented, outcomes of the reclassification process will be very difficult (if not impossible in the case of disposal) to change. It is therefore essential that the right outcome is achieved first time round. In that context, considered public input, particularly from those with on-the-ground knowledge of the land, its values and its management needs, is an important source of information for decision-makers. Adequate opportunities for such input must be provided for in the reclassification process.

Insufficient time for considered input

19. It is expected that the national panels will be assessing the reclassification of stewardship land at scale. Indeed their terms of reference states that panels will be required to consider stewardship land parcels at a regional scale. If land parcels are bundled together for assessment by national panels, considerable documentation will need to be reviewed by the public to ensure informed input. Shortening the public notice period would unjustifiably constrain submitters' abilities to undertake that review and to seek and obtain expert advice on any values. It is an unnecessary constraint on their ability to effectively participate in the decision-making process.

20. The issue is exacerbated by the proposal to remove hearing rights. Under the proposed approach, it would be necessary for submitters to articulate their full concerns in writing within a short timeframe, and there would be no subsequent opportunity to clarify, expand on or resolve those concerns prior to the Minister making a final decision on the future of the land in question.

Benefits of public input not recognised

21. The potential benefits of effective public participation in environmental decision-making processes are widely recognised and include: educating and informing the public; enhancing transparency in decision-making; incorporating public values into decision-making; improving the quality of decisions; increasing trust in institutions; reducing conflict; and achieving cost-effectiveness.[8] Reform option 1 undervalues these potential benefits and the efficiencies that can be realised through effective public participation. Hearing processes provide a useful opportunity for points of disagreement to be clarified or resolved, which can reduce the risk of subsequent challenge and delay. Such outcomes are arguably more consistent with the objectives of the proposed reform package, which seeks to achieve an efficient land reclassification process.

22. Further, declining a hearing on the basis that it is expected to take a long time and be resource intensive seems contrary to the Discussion Document's acceptance that greater public involvement (i.e., a longer submission period) is important for high profile land reclassification cases. It is the high-profile cases that are most likely to consume substantial time and resource. Hearings for these cases should not be cancelled. It is also likely that high profile or complex cases would benefit the most from direct questioning from the national panels. It is very unlikely that 'straightforward' land classification assessments would cause substantial delay or place a substantial burden on the

[8] Thomas Beierle, 1998, *Public Participation in Environmental Decisions: An Evaluation Framework Using Social Goals.* Resources for the future, Washington DC, USA

resources of the panel. Accordingly, the Discussion Document's rationale for declining a hearing seems misplaced. EDS submits that hearings should not be declined in any circumstance. They form an important part of the public engagement process and, if expertly led, enable parties to narrow issues and discuss solutions in an expedient manner.

Inconsistent with national conservation policy

23. The importance of public participation in conservation is expressly recognised in national policy direction. Policy 3 of the Conservation General Policy states:[9]

> *"People and organisations interested in public conservation lands and waters should be consulted on specific proposals that have significance for them."*[10]
>
> and
>
> *"People and organisations should be encouraged to participate in conservation…"*[11]

24. Analogous policy direction is included in the General Policy for National Parks 2005.[12] Both planning instruments are binding on DOC and the Minister under the Act.[13] Reform option 1 is inconsistent with the General Policies because, by limiting public participation in decision-making on stewardship land, they do not "encourage" participation in conservation.

Improvements to reform options

25. As noted above, EDS opposes Options 1.1 and 1.2 and supports the status quo of Option 1.3. However, if the reform options were to be adopted, EDS submits that the following changes would be required:

- Statutory guidance for the exercise of discretion be provided; and
- The only process related powers afforded to the national panels is that set out in s 49(3) - the hearings procedure.

26. First, Options 1.1 and 1.2 provide for unfettered discretion to extend the public submission period and decline hearings. With respect to Option 1.1, the Discussion Document states that there is an "expectation" that the national panels will allow a longer period for public submissions in cases with strong public interest. No accompanying statutory criteria is proposed to guide decisions as to when a longer submission period would be appropriate. The decision appears to be at a panel's unconstrained discretion.

27. Similarly, with respect to Option 1.2, the Discussion Document proposes an ability to decline a hearing on public submissions if the hearing would cause substantial delay or place substantial burden on the resources of the panels. It states that it is "envisaged" that this would only apply when a panel had determined that it had enough information from written submissions or from any

[9] Conservation General Policy 2005, Policy 3, at 18.
[10] Conservation General Policy 2005, Policy 3(e), at 18.
[11] Conservation General Policy 2005, Policy 3(f), at 18.
[12] General Policy for National Parks 2005, Policy 3, at 18.
[13] Conservation Act 1987, s 17A.

earlier engagement with the submitter. No accompanying statutory criteria is proposed to clarify when a hearing may be declined. Declining a hearing appears to be entirely at the panel's discretion.

28. If Options 1.1 and 1.2 were adopted, EDS submits that the reforms should also include statutory criteria specifying when the public submission period must be extended and when a hearing may be declined. For example, the Act could include new provisions in s 49 (public notice and rights of objection) as follows:

    - New s 49(2A) which states that if the exercise of power involves reclassification of stewardship land and is a matter of high public importance, the Minister must give persons and organisations wishing to make objections or submissions at least 40 working days. 'High public importance' could be defined as reclassification cases that are expected to attract significant public interest, involve high values, raise complex issues (i.e., ownership disputes) or where the land is adjacent to any conservation area or land administered by DOC; and
    - New s 49(2B) which states that hearings involving the reclassification of stewardship land may be declined if the Director-General considers that the written submissions received provide all the information required for the national panels to make a recommendation and the matter is not of high public importance (as defined above).

29. The inclusion of statutory criteria would define the decision-maker's discretion and provide greater transparency.

30. Finally, the national panels are advisory only, they have no statutory decision-making powers. They are independent and comprise expert members. Their task is limited to undertaking land classification assessments and providing recommendations to the Minister. 'Process' decisions about submission periods and hearings, which could involve political or policy considerations, are not within the panels' expertise. These decisions should be made by the Minister or Director-General (as is currently the case). Having said that, practically, it makes sense that the national panels should be able to determine the procedure of any hearing that they run (s 49(3)). This is discussed further under reform option 2 (below).

Conclusion on reform option 1

31. Overall, these reform options do not provide appropriate opportunities for public participation, particularly if the land reclassification has high public importance or involves complex issues. If Options 1.1 or 1.2 are adopted, EDS submits that greater statutory guidance should be included to appropriately demarcate powers and to ensure transparent decision-making.

Reform option 2: Enabling national panels to carry out public notification and submission process

32. To enable the national panels to carry out their work efficiently and effectively reform option 2 seeks to give national panels powers to carry out the public notification and submission process themselves (Option 2.1).

33. EDS does not support Option 2.1. EDS supports Option 2.2, retaining the status quo which involves DOC carrying out these processes.

34. As noted above, the national panels are advisory only and do not hold any statutory decision-making powers. Their expertise is to undertake land reclassification assessments and provide recommendations to the Minister. In that context, it is not appropriate that they make decisions on any 'process' matters, especially as those decisions may involve matters of policy. DOC should retain the public notification and submission process under section 49 of the Act. To allow otherwise would expand the scope of the national panels' functions beyond advisory matters to include administrative powers under s 49.

35. EDS considers that there is one exception to this. Once a hearing has commenced, it makes practical sense that the national panels determine the procedure of the hearing. Accordingly, EDS would support Option 2.1 if it was limited to s 49(3) of the Act.

36. The Discussion Document states that retaining the status quo may cause confusion about who is responsible for assessing the values of the land and may undermine the independence of the national panels. EDS disagrees with that concern. Once the submission period has closed DOC simply needs to 'hand over' all submissions received to the national panels for their independent review and consideration. That hand over does not confuse who is responsible for undertaking the reclassification assessment or undermine the national panels' independence. The process is akin to local authorities collating information for the Environmental Protection Agency (EPA) in a matter that is called in by the Minister, or the EPA providing information to a Board of inquiry.

37. EDS considers that there is a greater risk of a perceived lack of independence if the national panels are responsible for public notification and submission processes. For example, a national panel's decision to not extend a public submission period, or to decline a reclassification hearing, could be seen as self-serving. A high number of reclassification recommendations undertaken in a short timeframe may be used to demonstrate the national panels' success. Given that reclassifying land in the past has been fraught with challenges and delays there will be a lot of attention and pressure on the national panels to provide results in a timely fashion.

38. Further, the Discussion Document states that providing the national panels with public notification and submission process powers would enable the panels to receive the evidence "first-hand" from submitters. This is stated to imply some kind of advantage for the submitter, or a more thorough review by the national panels. Whether a national panel receives a submission direct from a submitter or in a collated form from DOC should make no difference to a national panel's consideration of it. Any suggestion that submissions recieved via DOC would be less comprehensively reviewed than those received direct from a submitter is extremely concerning for EDS.

39. Finally, the Discussion Document states that collating information and passing it on to the national panels for consideration may place a "considerable burden on DOC's resources". DOC has considerable experience in leading public notification and submission processes under the Act and related conservation legislation. Consequently, there may be efficiencies that could be harnessed from existing experience and expertise in this area. Further, the Discussion Document states that DOC is funding the national panels' work, thus the public notification and submission processes would be raised from the same budget, irrespective of who undertook the tasks.

40. If reform option 2.1. was to be adopted, EDS submits that a cautious approach should be taken when expanding panel functions. The functions of other statutory bodies (i.e., DOC and the New Zealand Conservation Authority (NZCA)) are expressly prescribed under the Act,[14] which promotes transparency with respect to the roles and accountabilities of different institutions. The functions of national panels are not expressly defined in the Act, because they were only ever intended to perform an advisory role. Any expansion of the national panels' roles and responsibilities, including under delegation, should be explicitly set out in the Act. As noted above, EDS submits that any delegation to national panels should be limited to s 49(3).

Reform option 3: Clarifying responsibilities for making recommendations to reclassify stewardship land to national park land

41. Under the National Parks Act, one of the core functions of NZCA is "*to consider and make proposals for the addition of lands to national parks and the establishment of new parks*".[15] NZCA is given discretionary powers to initiate an investigation, led by the Director-General, on any proposal to declare land as a national park.[16] Prior to making a recommendation to reclassify stewardship land as a national park, the Minister must obtain a recommendation (to that effect) from NZCA.[17]

42. Policy 6 of the General Policy for National Parks includes specific direction to guide NZCA and the Director-General in investigations and recommendations relating to national parks. For example:

- Prior to requesting an investigation of any proposal to declare land as a national park, the Authority must advise the Minister of the proposal; seek the views of relevant conservation boards; seek the views of tangata whenua; and the Authority is encouraged to seek the views of any relevant territorial authority and fish and game council *(Policy 6(d))*.
- The investigation process should include consultation with tangata whenua and seek written comments from, and have regard to the views of, interested people and organisations *(Policy 6(f))*.
- Before making a recommendation to the Minister on the creation of a new national park, the Authority must consult with any relevant conservation board; and the Authority is strongly encouraged ("should") to have regard to public submissions and the views of tangata whenua *(Policy 6(g))*.

43. The Discussion Document indicates that the NZCA-led recommendation process may not align with, or may duplicate, the role of the national panels.[18] To avoid this it proposes to assign primary responsibility for recommendations on the reclassification of stewardship land to national parks to national panels (Option 3.1).[19]

44. EDS supports Option 3.1, subject to inclusion of the following statutory process which would provide for the effective inclusion of NZCA's views in decision-making on national parks. Although the Discussion Document acknowledges that national panels will be required to consult with NZCA when

[14] Conservation Act 1987, s 6 (DOC) and 6B (NZCA)
[15] National Parks Act 1980, s 18(e)
[16] Ibid, s 8
[17] Ibid, s 7(2)
[18] DOC, above n 1, page 25.
[19] DOC, above n 1, page 25.

undertaking a land reclassification assessment of stewardship land to national park, it does not provide any detail about how that might happen. The following would provide that guidance:

- When undertaking a land reclassification assessment of stewardship land to national park, the national panel must consult with NZCA;
- If there are any points of disagreement between NZCA and the national panel, the national panel must invite NZCA to provide a written statement about those differences;
- The national panel must include any written statement from NZCA in its reclassification recommendation;
- The national panel must take into account the views of NZCA when making its reclassification recommendation; and
- If a national panel's recommendation is contrary to NZCA's advice, the national panel must provide a comprehensive list of reasons why it derogated from that advice in its reclassification recommendation.

45. EDS submits that if adopted, the reforms should include the above statutory process.

46. Finally, EDS notes that NZCA will retain its ability to recommend that conservation land that is not stewardship land be reclassified as national park. In that context, it is important that both the national panels and NZCA apply the same criteria (Policy 6 of the General Policy for National Parks) when recommending that land should be classified as national park.

Reform option 4: Removing the statutory step to declare all stewardship land to be held for conservation purposes before it can be reclassified and disposed of

47. Under s 62 of the Act, stewardship area is *deemed* to be held for conservation purposes. That land, or any interest in it (except the granting of a concession), cannot be disposed of until it is *declared* to be held for conservation purposes under s 7. The process of declaring land held for conservation purposes involves the Minister placing a notice in the Gazette declaring that the land is held for conservation purposes. There are no public consultation processes involved in that Gazetting process.

48. The Discussion Document describes the Gazetting process as "resource intensive" and proposes amending the Act to remove the process so that all stewardship land is declared to be held for conservation purposes (Option 4.1). The proposal is wide reaching because s 62 stewardship land comprises a substantial proportion of the stewardship land subject to these reform options.

49. EDS does not agree with the Discussion Document's description or analysis of the issue. The Discussion Document states that before stewardship land held under s 62 can be *reclassified or disposed of* it must go through the s 7 declaration process. That is an incorrect interpretation of the Act. The Act does not prohibit the *reclassification* of s 62 stewardship land. It only prohibits its *disposal*. Consequently, stewardship land does not have to be declared to be held for conservation purposes under s 7 before it can be reclassified. The administrative burden of placing a notice in the Gazette only applies to s 62 stewardship land that is being disposed of. Unless DOC intends to dispose of a significant proportion of stewardship land (the Discussion Document says most land will not be disposed of), it is hardly likely to be a 'resource intensive' process and promised efficiencies are unlikely to be realised.

50. EDS's statutory interpretation of the process of reclassifying s 62 stewardship land is as follows:

- The reclassification of stewardship land is undertaken by declaring it is to be held as a specially protected area under Part 4 of the Act (or other conservation areas under separate legislation):
    - Under s 18AA, the Governor-General may, on the recommendation of the Minister, declare any "*conservation area*" to be held for the purposes of a wilderness area, a sanctuary area, or both. Under s 2(1) of the Act, the definition of "conservation area" includes land that is "*for the time being held under this Act for conservation purposes*" (i.e., s 62 stewardship land).
    - Under s 18 of the Act, the Minister may, by Gazette notice, declare "*any land or interest in land, held under this Act for conservation purposes*" to be held for the purposes of a conservation park, an ecological area, or for any other specified purpose.
- Part 4 does not require that the land be formally declared under s 7 in order to be reclassified as any of these conservation categories.
- Further, s 8(1) of the Act provides that "*nothing in this Act shall prevent any conservation areas becoming a reserve, sanctuary, refuge, or national park under any enactment other than this Act administered by the Department*". In addition, s 8(2) expressly provides for the Minister to declare any conservation area to be a reserve under the Reserves Act 1977 and to have a classification under that Act. There is no express requirement in the Act that the formal declaration process under s 7(1) must be undertaken as an intermediary step, before the land is reclassified under other statutes.

51. EDS's analysis demonstrates that the Minister *may* exercise her statutory powers under s 7 to formally declare that all s 62 stewardship land is to be held for conservation purposes, but she is not *required* to complete this step prior to reclassifying stewardship land. The only constraint on s 62 stewardship land is that it cannot be disposed of until the formal declaration process under s 7 has been completed.

52. The approach adopted in the Discussion Document exaggerates the need for legislative amendment and the scale of potential efficiencies that would flow from Option 4.1.

53. As noted above, the key difference between stewardship land that is deemed to be held for conservation purposes (under s 62) and stewardship land which has been declared to be held for conservation purposes (under s 7) is that declared land can be disposed of. The Discussion Document states that the Act and the Conservation General Policy set strict parameters around the types of public conservation land that can be disposed, the implication being that removal of the statutory bar to disposal for stewardship land held under s 69 is inconsequential.

54. To an extent, the Discussion Document is correct. The Act and Policy do provide some limitations to disposal. Once land is declared to be held for conservation purposes it can only be disposed of in accordance with the provisions of the Act (s 16(1)). Section 26 of the Act provides for the disposal of stewardship areas held for conservation purposes. The section limits disposals to areas that are not:

- Foreshore; or
- Land adjacent to a conservation area (that is not stewardship area) or land adjacent to land administered by DOC under another statute (not the Act), unless the Minister is satisfied that

its retention and continued management as a stewardship area would not materially enhance the conservation or recreational values of the adjacent conservation area or land or, in the case of any marginal strip, of the adjacent water, or public access to it.

55. Under s 26 disposals must be publicly notified and objections can be lodged. The public notice and rights of objections set out in s 49 (discussed above) apply.

56. The Minister's powers to dispose of stewardship land is also currently constrained[20] by the policy direction set out in the Conservation General Policy. The Policy sets a threshold for land disposal of "no, or very low conservation values" and lists circumstances when land should not be disposed of:

> *"Land disposal may be considered where the legislation to which it is subject allows for disposal and the land has no, or very low conservation values* (Policy 6(c)).
>
> *Subject to policy 6 (c), land disposal should not be undertaken where the land in question either:*
> - *(i) has international, national or regional significance; or*
> - *(ii) is important for the survival of any threatened indigenous species; or*
> - *(iii) represents a habitat or ecosystem that is under-represented in public conservation lands or has the potential to be restored to improve the representation of habitats or ecosystems that are under-represented in public conservation lands; or*
> - *(iv) improves the natural functioning or integrity of places; or*
> - *(v) improves the amenity or utility of places; or*
> - *(vi) improves the natural linkages between places; or*
> - *(vii) secures practical walking access to public conservation lands and waters, rivers, lakes or the coast (*Policy 6(d))"

57. The above policies provide a robust safeguard to ensure that land with conservation values is not disposed of. They are not, however, set in stone. The Act provides a mechanism to amend or revoke statements of general policy "*from time to time"*, after complying with various consultation and other procedural requirements. This leaves the above policies vulnerable to the agenda of future Governments, which could lower the bar for land disposals.

58. A decision to dispose of stewardship land does not automatically mean that the land will be sold on the open market (although the Discussion Document accepts that it is likely that at least some stewardship land will be sold). Before disposal DOC must check that the land is not required for future Treaty settlements (using the Māori Protection Mechanism) or by another Crown agency, or that the land is not required to be offered back to a former owner. These mechanisms provide the final 'hurdle' for the disposal of stewardship land.

59. The Discussion Document states that there is "minimal risk" in declaring all s 69 stewardship land to be held for conservation purposes because of the above checks on disposal and that there are "no notable benefits" to retaining the legislative Gazetting process.

60. EDS does not agree with that position. Understood in the context of the other reform options proposed in the Discussion Document, EDS considers that Option 4.1 (declaring all stewardship land

[20] The Supreme Court in *Hawke's Bay Regional Investment Company v Royal Forest and Bird Protection Society of NZ* confirmed that the Conservation General Policy is binding on the Minister [2017] NZSC 106 at [129] - [149].

to be held for conservation purposes) could more readily enable disposal of stewardship land in a 'fast-tracked' manner. With greater funding (Option 5.1) an increased amount of stewardship land could be disposed of after a shortened public submission period and no hearing (Options 1.1 and 1.2). This is not sufficiently articulated in the Discussion Document, which focusses on the (misunderstood and exaggerated) administrative burden of the s 7 declaration process.

61. First, it is apparent from the Discussion Document and the Terms of Reference for the national panels that a panel's reclassification assessment can include a recommendation to dispose of stewardship land. What is not clear, is whether, having received a recommendation from a national panel to dispose of stewardship land, the Minister will still be required to notify the disposal (as is currently required by s 26). This could create a two-step submission and hearing process for a parcel of land:

    - The Minister (or the national panels as proposed in the Discussion Document) would publicly notify a reclassification assessment for a parcel of land. The national panel would (potentially) hold a hearing to hear any submissions.
    - If the national panel recommended disposal of the parcel, the Minister would then need to publicly notify the disposal and hold any hearings.

62. EDS is not convinced that the reform options intend for this two-step process to occur. Rather, if reform option 4.1 is adopted, it is more likely that once national panels have made their recommendation to the Minister to dispose of a parcel of stewardship land she will, subject to the constraints listed above in the Act and the Conservation General Policy, proceed with disposal. This eventuality could occur in the context of a shortened public submission period and no hearing.

63. The issue is exacerbated because the threshold for land disposal of "no, or very low conservation values" set out in the Conservation General Policy is not guaranteed and can be amended or revoked at any time by current or future Ministers. EDS has reviewed the 2017 Supreme Court's '*Ruataniwha'* decision. That case is authority that the Conservation General Policy is binding on decision-makers. It is not authority that land cannot be disposed of unless it has "no, or very low conservation values". That 'test' is only valid if it remains in the Conservation General Policy, which can be amended or revocked at any time.

64. Accordingly, EDS would support Option 4.1 if:

    - After receiving a recommendation to dispose of stewardship land, section 26 still applied so that the disposal is separately notified; and
    - The threshold for land disposal of "no, or very low conservation values" was made into a statutory test (i.e., removed from the Conservation General Policy and put into the Act).

65. In the absence of those two changes, EDS opposes Option 4.1, and supports the status quo (Option 4.2).

Reform option 5: Enabling the Minister of Conservation to direct the proceeds of sale of stewardship land to DOC

66. Currently, proceeds from the disposal of stewardship land must be paid to the Crown's trust account, thus the costs of selling stewardship land are non-recoverable by DOC. To rectify this the Discussion Document proposes amending the Act to allow the Minister to direct the proceeds of sale of stewardship land to DOC for further classification or management activities (Option 5.1).

67. There is a clear need for DOC to recover the costs associated with the assessment and disposal of stewardship land that is determined to be of "no, or very low" conservation value. However, EDS considers the proposal to generally direct funds toward DOC's baseline budget, without any clear direction on what those funds will be used for, represents a missed opportunity.

68. EDS submits a better option would be to adopt a "dual purpose" approach, whereby the quantum of proceeds that can be directed toward DOC's operational expenditure is capped by the total costs spent on preparing land for sale; and any surplus proceeds are directed to the Nature Heritage Fund to facilitate future land purchases in areas that need the greatest protection.

69. This approach is preferred because it recognises that land disposals represent a net loss to the conservation estate. Although disposal can only occur if land is of "no, or very low" conservation value, its loss represents a lost opportunity to restore the land. The redirection of funds to the Nature Heritage Fund would ensure that any surplus funds are held on trust to enhance the values of the future conservation estate through permanent protection measures and would better align with the purposes of the Act.

70. EDS therefore supports Option 5.1, provided the proceeds of sale are used to advance long-term conservation priorities in addition to covering DOC's operational costs associated with stewardship land disposal.

Reform option 6: Clarifying the status of concessions on reclassified stewardship land

71. Reform option 6 attempts to address the issue of what to do with existing concessions when the land classification changes, or the land is disposed of. As there is no statutory process in the Act for manging existing concessions in these instances, DOC has historically dealt with concessions on a case-by-case basis.

72. The Discussion Document notes that there are a significant number of concessions on stewardship land. Coupled with the large amount of land that DOC intends to reclassify, it states that the current approach is expected to create significant delays in finalising land reclassifications. Two options are proposed for dealing with the issue:

    - Continue to find solutions on a case-by-case basis and concessions continue regardless unless parties agree otherwise (status quo) (Option 6.1); or
    - Amend the Act to clarify that existing concessions on stewardship land can continue under existing terms and regardless of classification (Option 6.2).

73. EDS agrees that the current case-by-case approach is not appropriate going forward but does not support Options 6.1 or 6.2. Neither of the options address the issue identified in the Discussion Document that a land's conservation values may not be protected. .

74. EDS's understanding of Option 6.2 is that land subject to concessions will be able to be reclassified, however the concession will continue under its current terms regardless of the land's new status. That includes allowing a concession to continue until its expiry, which may be decades if the concession includes a right of renewal. EDS strongly opposes Option 6.2, which would entrench existing concessions and the privileges they afford concession holders in respect of public conservation land. In some cases, existing arrangements could be 'locked-in' for another 30 years (or longer). That may include grazing licences or leases over land held for conservation purposes. As identified in the Discussion Document, allowing activities to continue for prolonged periods of time may have implications for the protection of the land's conservation values. Particularly if the land is reclassified to have a higher level of protection.

75. This approach is inconsistent with the definition of "conservation" in the Act, which directs decision-makers to protect conservation values; and to safeguard the options of future generations in respect of natural and historic resources.[21] It is also contray to the objectives of this legislative review, which are "ensuring DOC meets its wider obligations under conservation legislation and the Conservation General Policy" and "ensuring conservation values are adequately protected'.

76. Further, EDS is unclear what DOC intends to do when a national panel recommends that stewardship land that is the subject of a concession be disposed of. Does Option 6.2 anticipate that DOC would retain ownership of that land, which has been assessed as no/low value, until the concession expired? If that was the case, would DOC continue paying for weed and pest management and maintenance/holdings costs in the meantime?

77. Proposed reform option 6 has a narrow focus and fails to explore other ways in which existing concessions can be addressed. Crucially, the Act currently provides for the variation of concession conditions:

    - The Minister and a concession holder may vary any conditions of a concession "*at any time*" by agreement and in writing where the variation will not materially increase the adverse effects of the activity;[22] and
    - The Minister may, on her own motion, vary the conditions of a concession where the variation is the result of a review provided for in the concession document.[23]

78. Most concessions are granted for five to ten years, with a review after three years.[24] The Minister could seek to vary the conditions of concessions on stewardship land on an on-going basis as soon as they come up for review. This option is not investigated in the Discussion Document.

79. There are also alternative options available through bolder legislative reform. For example, the Act could be amended to state that all concessions are deemed to include a condition triggering their automatic review on the reclassification of the subject land (this could be inserted into s 17ZC of the Act). This would provide an opportunity to align existing concessions with the new status of land following its reclassification. It would also allow existing concessions to continue to apply in the interim, until the land classification process is finalised.

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[21] Conservation Act 1987, s 2(1)
[22] Conservation Act 1987, s 17ZC(1)
[23] Ibid, s 17ZC(3)(a)
[24] DOC, above n 1, at 31

80. This approach is supported by the scheme of the Act, which provides that concessions are not intended to confer 'fixed' privileges to concession holders where it is inconsistent with contemporary conservation objectives. For example, s 17W of the Act describes the important relationship between concessions and statutory planning instruments, specifically conservation management strategies (CMS) and conservation management plans (CMP):

    - Section 17W(7) states:

        "*It shall be a condition of every concession document that the concessionaire must act in accordance with every relevant [CMS] and [CMP] for the time being in force, including any amendments to the strategy or plan, whether the strategy or plan or amendment was approved before or on or after the date on which the concession became effective; and that condition shall be deemed to be included in every concession document."*

    - Section 17W(8) states:

        "Any provision of a concession document that contravenes or allows expressly or by implication any action or default on the part of the concessionaire in contravention of the strategy or plan shall have no effect and any breach or contravention of the strategy or plan shall be deemed to be a breach or contravention of the concession and concession document."

81. The legislative direction suggests DOC's current approach to managing existing concessions, by allowing them to continue *unaltered* until they expire, is ultra vires the Act. It prioritises private property rights over the protection of conservation values, which is DOC's core function.

82. Finally, to protect against further entrenchment of the status of concessions on stewardship land there is an urgent need to enact legislative changes to ensure any new concessions issued or renewed include an ability to review the concession once the status of the land has been finalised. This would ensure the legacy issue is not perpetuated by the issuing of new concessions.

83. Accordingly, EDS supports:

    - An alternative reform option that provides for the review of existing concessions on the reclassification of stewardship land; and
    - Urgent amendment to the Act to ensure that any concessions issued or renewed include an automatic review condition upon land reclassification.

Conclusion

84. Overall, there is a general misalignment between the 'problem' of past delays in the reclassification of stewardship land and the reform options set out in the Discussion Document. There appears to be a lack of substantive need for the proposed reform options, and there is a real risk that the proposals could lead to perverse outcomes. Proposals to reduce public participation and effective review of land assessment processes, and to preserve existing concessions privileges that are incompatible with conservation objectives, are unacceptable.