SUBMISSION ON PRELIMINARY PROPOSAL FOR TENURE REVIEW OF DUNSTAN DOWNS PASTORAL LEASE, MACKENZIE BASIN

SUBMITTER DETAILS

FULL NAME:	Environmental Defence Society Incorporated
ADDRESS FOR SERVICE:	PO Box 91736, Victoria Street West, Auckland 1042
CONTACT:	Cordelia Woodhouse
TELEPHONE:	09 302 2972
EMAIL:	cordelia@eds.org.nz

DATE: 24 November 2020

INTRODUCTION

1 This is a submission on the Commissioner of Crown Land's (**Commissioner**) Preliminary Proposal for tenure review of the Dunstan Downs pastoral lease (**Preliminary Proposal**) publicly notified under s 43 Crown Pastoral Land Act 1998 (**CPLA**).

2 The Environmental Defence Society Incorporated (**EDS**) is a not-for-profit, non-government, national environmental organisation. It was established in 1971 with the objective of bringing together the disciplines of law, science, and planning in order to promote better environmental outcomes in resource management. EDS has been active in assessing the effectiveness of statutory processes in addressing key environmental issues including landscape, natural character, and biodiversity. It has previous involvement in processes relating to the Mackenzie Basin[1], including submissions on a number of tenure review proposals.

3 The Dunstan Downs pastoral lease forms part of the 'iconic' Lindis Pass, the gateway to the Mackenzie Basin when coming from Central Otago. The Lindis Pass, including the whole of the Dunstan Downs pastoral lease, has been identified in RMA documents as an outstanding national landscape at a regional scale. It is an area of 'exceptional aesthetic and shared and recognised landscape values, and high natural science, legibility and transient values' and is one of the best examples of tussock landscapes in the Canterbury region.[2] The Lindis landscape unit has very high public visibility and forms an important enclosure and scene-setting for the Lindis Pass highway when travelling in either direction.[3] The area contains a range of vegetation types, including the presence of full ecological sequences and provides important habitat for a number of threatened or declining species.

4 Attached to and forming part of this submission are:

- Statement by Diane Jean Lucas – landscape (**Attachment A**)
- Summary of: tenure review outcomes; tenure review in the Mackenzie Basin; legal framework (**Attachment B**)

[1] The north-eastern portion of Dunstan Downs falls within the geographic scope of the Mackenzie Basin Agency Alignment Programme.
[2] *Canterbury Regional Landscape Study Review: 2010 report*, Boffa Miskell, p 92
[3] See Ms Lucas' Landscape Assessment (Attachment A)

5 The following issues are discussed:

- Summary of preliminary proposal
- EDS position
- Relief

SUMMARY OF PRELIMINARY PROPOSAL

6 The Dunstan Downs lease covers[4] an area of approximately 12,351.3705 hectares within the part of the Mackenzie Basin subject to Waitaki and Otago District Council jurisdiction. The land is owned by the Crown but subject to pastoral lease no. PO019 established under s 66 Land Act 1948.

7 Under the Preliminary Proposal:[5]

- Approximately 1,000 hectares are proposed to be designated as land to be restored to full Crown ownership and control by the Department of Conservation (**DOC**) as conservation area pursuant to s 35(2)(a)(i) CPLA. This designation comprises two areas marked CA1 and CA2 on the accompanying maps.
- Approximately 5,356 hectares are proposed to be designated as land to be restored to Crown control as a conservation area pursuant to s 35(2)(b)(i) CPLA subject to an easement concession pursuant to s 36(1)(a) CPLA. This designation compromises the area marked CA3 on the accompanying maps.
- Approximately 850 hectares are proposed to be designated as land to be restored to Crown control as a conservation area pursuant to s 35(2)(b)(i) CPLA. This area is subject to a grazing concession pursuant to s 36(1)(a) CPLA and the continuation of an existing easement in favour of the New Zealand Police pursuant to s 36(3)(c) CPLA. This designation compromises the area marked GC1 on the accompanying maps.
- Approximately 2,320 hectares are proposed to be designated as land to be restored to Crown control as a conservation area pursuant to s 35(2)(b)(i) subject to a grazing concession pursuant to s 36(1)(a) CPLA. This designation compromises the area marked GC2 on the accompanying maps.
- Approximately 2,815 hectares are proposed to be disposed of by freehold disposal to Dunstan Downs Limited pursuant to s 35(3) CPLA. This designation compromises the area marked FH on the accompanying maps. This area is subject to two protective conservation covenants pursuant to s 40(1)(b), 40(2)(a) and 40(2)(b) CPLA. This first, marked CC1, comprises 30 hectares and the second, marked CC2, comprises 865 hectares. The proposed Special Conditions for covenant CC2, allows for the grazing of sheep and cattle and the maintenance of existing oversowing and topdressing of the land.[6]

8 Reasons for the proposed designations are set out in the Summary of Preliminary Proposal[7] (Proposal Summary). Key reasons are:

[4] Lease PO019; Legal description sections Part Run 201A, situated in Ahuriri, Hawkdun, Lindis, Longslip and St Bathans Survey Districts, Section 4 SO Plan 23073 and Section 2, Block 16 Longslip Survey District; Certification of Title OT 338/47
[5] See: Summary of Preliminary Proposal; Preliminary Proposal Schedule 1 and 2.
[6] Preliminary Proposal, Appendix 8, Schedule 2: Special Conditions
[7] The Preliminary Proposal document itself sets out the specific terms of the proposal. It provides no analysis, explanation or reasons.

- Area CA1 contains significant inherent values primarily related to the natural vegetation that is in "*good to excellent condition*". It also contains significant landscape values and is highly visible from SH8. Area CA2 contains a continuation of tussock grasslands at altitudes between 1140 to 1780 metres.

- A number of threatened species were identified in the area CA3, with further species likely to be present. From a landscape perspective, the area is considered to have "*a high degree of naturalness, intactness, coherence and legibility".*[8] Much of the significance of the area comes from the scale of the landscape involved.

- Area GC1 has similar significant inherent values to areas CA1 and CA2. The significant inherent values will be "*best managed by the removal of grazing allowing for recruitment and growth".*[9] However, a grazing concession for a term of 15 years is proposed to allow time to restructure the current farming operation.

- Area GC2 contains a number of ecological and recreational significant inherent values. From a landscape perspective the area sustains "*a special natural quality and integrity in relation to the high country landscape*".[10] Similar to GC1, the area will best be managed by the removal of grazing, however a grazing concession of a term of 10 years is proposed.

- Area FH contains significant inherent values, particularly in relation to landscape, but "*these values can be adequately protected through covenants*". This is the residual area after the "*recognition of the most significant inherent values*".[11]

- Much of the significant inherent values across the lease are a result of the "*scale of the landscape and the transitions that occur within the vegetation types*". The preference of restoration to Crown ownership has been pursued where appropriate.[12]

- It is anticipated that the proposed freehold land is "*capable of maintaining pastoral use in an ecologically sustainable manner*".[13]

EDS POSITION

9 EDS opposes the Preliminary Proposal on the basis that it:

- Reflects an unlawful application of the decision-making framework and statutory objects applying to tenure review under Part 2 CPLA.

- Is based on outdated, inadequate and insufficient information.

- Fails to provide sufficient reasons for the decision reached and the designation proposed.

- Fails to consider alternatives to the proposed designation.

- Does not promote land management that is ecologically sustainable.

- Does not enable protection of all significant inherent values on the property.

[8] Summary Proposal at 2.3
[9] Summary Proposal at 2.4.1
[10] Summary Proposal at 2.5
[11] Summary Proposal at 3.5
[12] Summary Proposal at 3.3
[13] Summary Proposal at 3.1

- Fails to recognise the National Water Conservation (Ahuriri River) Order 1990.
- Fails to take a landscape-scale strategic approach.

10 EDS contends that the proposed designations will not enable protection of significant inherent values on the Dunstan Downs's lease nor provide for its management in a way that is ecologically sustainable. These two outcomes are mandatory and are the primary objects of tenure review.

11 Significant inherent landscape values are identified across the lease. Much of the inherent value is derived from the scale of the landscape and the ecological transitions that occur within it. The presence of significant inherent landscape values from the Dunstan Range summit down to Longslip Creek, SH8 and the lease boundary (the area proposed to be disposed of by freehold) is confirmed in Ms Lucas's statement of evidence (Attachment A).

12 EDS considers that to provide for these significant inherent landscape values the entirety of the lease (homestead and curtilage excepted) should be restored to full crown ownership and control by DOC as a conservation area. To support the management of appropriate vegetative cover, the area should be subject to briar and wilding pine removal.

13 The disposal of the land to freehold will open the land up to significant development pressure. The area designated as FH lies within the Waitaki District, and the FH area comprises both 'ONL' and 'Rural Scenic' zoning (see sheet 13 to Attachment A). The Waitaki District Plan provisions applying to Rural Scenic land are much weaker than those applying to ONL. Pastoral intensification and agricultural conversion are permitted activities. Subdivision to a lot size of 20 hectares is a discretionary activity. Intensification of farming and further subdivision could both have significant effects on landscape and biodiversity values.

14 In addition, as some of the FH area is not identified as an ONL, afforestation and replanting of plantation forestry is likely to be a permitted activity under the National Environment Standard for Plantation Forestry. Plantation forestry is not a suitable land use for the Mackenzie Basin as it is incompatible with the area's landscape and dryland ecosystems. Exotic plantation forestry also carries a significant risk of wilding conifer proliferation in these ecosystems.

Specific concerns

Information

15 It does not appear from the Preliminary Proposal documents that adequate information has been considered:

a. There is no assessment of the ecological sustainability of the proposed designations at a property or wider landscape scale. As a result, EDS does not understand how the Proposal Summary's conclusions that the proposed designations achieve ecological sustainability were reached.

b. The Conservation Resources Report prepared in 2002 is outdated. Significant change has occurred in the Mackenzie Basin in the past 18 years. No updated assessment of significant inherent values or ecological sustainability in the 2020 context appears to have been undertaken.

c. The Preliminary Proposal also does not into account the effects of the designation on the National Water Conservation (Ahuriri River) Order 1990. The Proposal currently seeks to

freehold part of the lease directly adjacent to the River, which may result in adverse effects on the qualities the water conservation order seeks to protect.

16 As a result, the Preliminary Proposal has reached a conclusion as to appropriate designations and protective mechanisms that is unreasonable, and which will not give effect to the objects in s 24 CPLA.

Reasons: inadequate

17 The Preliminary Proposal supporting documents do not give adequate reasons for the designation decision reached.

18 Reasons must be more than a statement of conclusion[14] or of the test to be applied. They may be abbreviated,[15] but should be "*sufficient to show to what they were directing their mind*"[16] thereby showing whether the decision was lawful. The three underlying grounds for the importance of giving adequate reasons for decisions are:[17]

- To uphold the principle of openness in the administration of justice[18]. Openness is critical to maintenance of public confidence in the justice system. Without reasons it may not be possible to understand how a decision was reached, excluding public from decision-making. Accountability is undermined[19].
- To provide a basis on which the lawfulness of decisions can be assessed on appeal or review.[20]
- To provide protection against wrong or arbitrary decisions.[21]

19 Failure to give adequate reasons leaves decisions vulnerable to challenge.[22]

20 The reasons given for the Preliminary Proposal are inadequate because they do not:

- Explain how and to what extent the hierarchy in s 24 CPLA has been taken into account.
- Explain how and to what extent the Treaty of Waitangi has been taken into account.

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[14] In the RMA context the Court has confirmed that 'reasons' must be more than a statement of conclusion: ***Environmental Defence Society Inc v Manawater-Wanganui Regional Council***; ***Friends of Houghton Valley Inc v Wellington City Council*** [2015] NZHC 234, (2016) 19 ELRNZ 62, [2016] NZAR; ***Marche Ltd v Auckland Council*** [2016] NZHC 145, (2016) ELRNZ 55, [2016] NZRMA 139, [2016] NZAR 542.. At the level of principle are transferrable to CPLA decision-making.

[15] ***Lewis v Wilson Horton Ltd*** [2000] 3 NZLR 546 (CA) at [81].

[16] ***Lewis*** fn7 at [81] quoting Lord Donaldson MR in ***R v Civil Service Appeal Board, ex parte Cunningham*** [1991[4 ER 310, 319.

[17] ***Lewis*** fn 7 at [70]. Unsuccessful appeal by Lewis of a decision of the High Court quashing an order made in the District Court prohibiting the publication of his identify in any report of the court proceedings. Both appellate courts found that it was impossible to know what factors the District Court had considered relevant from the decision. The High Court had been correct to find this an error of law]. Note that this collapsed the 6 grounds previously identified by the Court of Appeal in ***Sing v Chief Executive, Department of Labour*** [1999] NZAR 258 (CA) at 262-263:
"(1) Formulating reasons imposes discipline on decision-makers as the cognitive process involved can cause preliminary views to be revisited;
"(2) Reasons assure parties that their evidence and arguments have been carefully assessed in accordance with law;
"(3) Reasons identify the chain of logic that supports a decision and assists parties to decide whether to challenge it by appeal, review or other complaints mechanism;
"(4) Reasons ensure parties of an effective right of appeal or review and assist counsel and the court in marshalling the challenge and assessing its merit;s
"(5) A practice of providing reasons establishes a body of precedence or guidance affecting the exercise of powers; and
"(6) Reasoned decisions assure the legitimacy and openness of the exercise of power and promote public accountability."

[18] ***Lewis*** fn7 at [76].

[19] ***Lewis*** fn7 at [79].

[20] ***Lewis*** fn7 at [80].

[21] ***Lewis*** fn7 at [82].

[22] ***Marche*** fn 14 at [23] – [24]

- Explain why the proposed designations are the best way to achieve the objects of tenure review and what other alternative designation options (including use of protective mechanisms) have been considered.

- Set out what, if any, additional information has been considered in reaching a decision on the Preliminary Proposal.

- Identify how freehold ownership will enable protection of significant inherent values across that portion of the lease.

- Give supporting evidence and rationale for the conclusion that the land is capable of ecological sustainable management under a pastoral regime in its present state.

- Explain how freeholding land to enable further development is consistent with promoting ecological sustainability and enabling protection of significant inherent values.

Other material

21 EDS understands that LINZ's approach to decision-making on tenure review is to apply Cabinet Minute 'Crown Pastoral Land: 2009 and Beyond' (Minute (09) 267C) (**Minute**)[23]. EDS accepts that application of the Minute is not recorded in the Preliminary Proposal documents.

22 The Minute sets an "*end outcome"* for Crown pastoral land (and so tenure review) that "*Crown pastoral land is put to the best use of New Zealand"*[24]. That outcome is stipulated to mean "*that Crown pastoral land is put to the best use for economic, environmental, and cultural purposes"*[25]*.*

23 The Minute also records the "*government's objectives for Crown pastoral land*"[26]. Objectives different and additional to those in s24 CPLA are set, relevantly:

- Ensure that "*pastoral*" values are maintained and protected.

- Promote "*the contribution of Crown pastoral land to New Zealand's economy*".

- Value the "*iconic nature of high country farming and its contribution to New Zealand culture".*

- Value "*viable rural high country communities".*

24 EDS considers the Minute is *ultra vires* the CPLA and should not be applied because:

- It is inconsistent with s 24 CPLA. Extraneous material can only be considered if consistent with the stated objects of tenure review. That is set in s 24. It contains a number of objectives which sit within a hierarchy and which are the intended end outcome of tenure review. At the top of the hierarchy are promoting land management that is ecologically sustainable and enabling protection of significant inherent values. Freeing from management restraint and freeholding and subordinate.

  The Minute effectively replaces and redrafts s 24 CPLA. No hierarchy is stipulated. New economically focused objectives are included. A balanced exercise between economics, environment, and cultural factors is applied[27].

[23] Email from Janet Harris 6/7/17 to Gary Taylor in response to request for information on LINZ process link to Minute and supporting Cabinet paper included.
[24] Minute at paragraphs 7 and 8.
[25] Minute at paragraph 9.
[26] Minute at paragraph 10.

- Cabinet cannot override legislation and purport to fetter the Commissioner's ability to consider tenure review proposals under the decision-making framework in ss 24-26 CPLA[28].

RELIEF

25 With regard to those properties continuing through the tenure review process, EDS seeks that decision making be applied as set out in Appendix B.

26 With regard to the tenure review of Dunstan Downs:

- That the entirety of the lease (homestead and curtilage excepted) be restored to full crown ownership and control by DOC as a conservation area.
- That the homestead block be freeholded.

Alternatively:

- That no Substantive Proposal be put to the leaseholder and LINZ offers to buy out the lessee.

27 Prior to a Substantive Proposal being developed for Dunstan Downs, a thorough and up to date exert assessment of the landscape and ecological values should be commissioned by LINZ. This should include a final analysis of significant inherent values and designation recommendations as well as an analysis of the role and importance of each part of the property in terms of the ecological sustainability of the property, and its importance within the context of the entire Mackenzie Basin.

28 EDS also seeks to be involved in any negotiations or consultation on the development of a Substantive Proposal as available under s 26 CPLA.

[27] Cabinet Paper A676415 pg 4, [49] bullet 1: explanation of interpretation and application of strategic direction requiring balancing approach.

[28] For a recent analogous situation where fettering of decision-making power by governing body resolution was found to be unlawful see: ***Wellington Fish & Game Council & Environmental Defence Society Inc v Manawatu-Wanganui Regional Council*** [2017] NZEnvC 37 at [37]-[48] and [186].

ATTACHMENT A
Diane Jean Lucas (Landscape Assessment)

ATTACHMENT B

Summary of: tenure review outcomes; tenure review in the Mackenzie Basin; legal framework

TENURE REVIEW: SUMMARY OF OUTCOMES

1 The outcomes of tenure review to date have been subject to extensive academic scrutiny[29]. Key points include:

- Rapid loss of threatened, endemic high country ecosystems demand a moratorium on tenure review for a comprehensive process review.
- Areas being retained in Crown ownership and control are not the areas which contain the most significant, rare, or threatened ecosystems. In other words, the more threatened the ecosystem, the more likely it is to be freeholded under tenure review.
- A black and white approach is being taken with Crown ownership or fee simple being the only management options pursued. This is resulting in suboptimal outcomes. A more nuanced[30] and innovative approach is available if consistent with s24 CPLA.
- The quantum paid by the Crown to the leaseholder for the lease is significantly more than that paid by the leaseholder to the Crown for the land. This is despite evidence that on average new freehold land sells for 493 times the Crown's selling price.
- The entire Mackenzie Basin is a significant natural area for the purposes of s6(c) RMA. Those significant values are being lost quickly. There is a strong ecological and economic case for immediate moratorium.
- Any freehold land should be subject to a wilding pine removal covenant.

TENURE REVIEW IN THE MACKENZIE BASIN

2 Tenure review is one of a number of land management processes at play in the Mackenzie Basin. The others are:

- Regional consents for water take and discharges
- District consents for land use
- Establishment of the Mackenzie Country Trust

3 Failure by administrators to take a joined up and strategic approach between processes has resulted in deterioration of the natural environment with resultant loss of internationally, nationally, and regionally unique, rare, and threatened ecological, landscape and natural character values. This failure was recognised by the Environment Court[31] and has resulted in the formation of the Mackenzie Basin Agency Alliance, which seeks to protect the iconic Mackenzie landscape, its water quality and its precious indigenous flora and fauna.

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[29] By the PCE: April 2009 Report: *Changes to the High Country: Environmental Stewardship and Tenure Review.* June 2011 Follow up report. By various academics e.g.: *South Island High Country Land Reform 1995-2015,* Ann Brower: http://igps.victoria.ac.nz/publications/PQ/2016/PQ12-1-Brower.pdf, *Land reform in the Godzone: Case Studies in the Environment*, A Brower 2017, *Legal Aspects of High Country Pastoral Leases and the Tenure Review Process: A background paper*, Barry Barton, July 2006 (Report for the PCE) By the Courts: ***Federated Farmers v Mackenzie District Council*** [2017] NZEnvC53.

[30] For example a more nuanced approach might include freeholder land around a farm based area which does not exhibit ecological SIVs subject to a covenant for landscape purposes. Some land revert to Crown ownership and direct control and some reverting to Crown ownership and concession granted for low density grazing by DOC.

[31] See ***Federated Farmers of New Zealand v Mackenzie District Council*** [2017] NZEnvC 53 (11th Decision).

4 The failures of the tenure review process have also been recognised and in February 2019 Cabinet agreed to end tenure review. This is reflected in the Crown Pastoral Land Reform Bill which is currently before the Select Committee. Until the law changes, tenure review proposals are to be assessed under the existing law. A summary of the legal framework is included below.

SUMMARY OF LEGAL FRAMEWORK

5 Tenure review is the process under which the tenure (ownership) of land currently owned by the Crown but subject to a pastoral lease established under s66 LA is reviewed and, potentially, changed.

6 The process is set out in Part 2 CPLA. It comprises 3 steps:

- Initial review (ss27-33 CPLA).
- Release of a preliminary proposal (ss34-45 CPLA).
- Release of substantive proposal (ss46-82 CPLA).

7 SS24-26 CPLA set out the underlying decision-making framework that applies to all 3 stages.

8 S24 CPLA sets out the objects of tenure review:

> ***24 Objects of Part 2***
>
> *The objects of this Part are—*
>
> *(a) to—*
>
> *(i) promote the management of reviewable land in a way that is ecologically sustainable:*
>
> *(ii) subject to subparagraph (i), enable reviewable land capable of economic use to be freed from the management constraints (direct and indirect) resulting from its tenure under reviewable instrument; and*
>
> *(b) to enable the protection of the significant inherent values of reviewable land—*
>
> *(i) by the creation of protective mechanisms; or (preferably)*
>
> *(ii) by the restoration of the land concerned to full Crown ownership and control; and*
>
> *(c) subject to paragraphs (a) and (b), to make easier—*
>
> *(i) the securing of public access to and enjoyment of reviewable land; and*
>
> *(ii) the freehold disposal of reviewable land.*

9 S24 "*is not about balancing competing values; it has an internal structure that avoids that*"[32]. It contains a hierarchy. The importance of the hierarchy in s24 to decision-making is discussed below.

10 S25 CPLA sets out the matters that must be taken into account by the Commissioner in acting under Part 2 CPLA. It sets out the framework for decision-making on tenure review: what is to be considered and how:

> ***25 Matters to be taken into account by Commissioner***

[32] *Legal Aspects of High Country Pastoral Leases and the Tenure Review Process: A background paper*, Barry Barton, July 2006 (Report for the PCE) at pg 29.

(1) In acting under this Part, the Commissioner must (to the extent that those matters are applicable) take into account—

(a) the objects of this Part; and

(b) the principles of the Treaty of Waitangi; and

(c) if acting in relation to land used or intended to be used by the Crown for any particular purpose, that purpose.

(2) In acting under this Part in relation to any part of the land held under a reviewable instrument or reviewable instruments, the Commissioner must take the objects of this Part into account in the light of—

(a) their application to all the land held under the instrument or instruments; rather than

(b) their application to that part of the land alone.

11 S26 sets out consultation requirements that must be fulfilled before undertaking each of the 3 process steps:

26 Consultation

(1) Before taking any action specified in subsection (3), the Commissioner must consult the Director-General of Conservation.

(2) At any time, the Commissioner may consult any person or body the Commissioner thinks fit (including the Director-General of Conservation) about taking any action specified in subsection (3).

(3) The actions are—

(a) undertaking a review under section 27:

(b) putting a preliminary proposal to a person under section 34(1):

(c) putting a substantive proposal to a person under section 46.

CONSULTATION

12 Consultation is required at all 3 stages of the tenure review process. Consultation with DOC is mandatory. Consultation with "*any person or body the Commissioner thinks fit"* is optional.

13 There is no requirement to consult with the lease-holder. There is no prohibition on consultation at any stage with other interested groups, for example, the Mackenzie Trust and EDS.

14 Consultation involves the statement of a proposal not yet finally decided upon, and that the party obliged to consult must keep an open mind and be ready to change and even start afresh[33]. It does not require neutrality.

15 Requirement to consult does not prevent the Crown from pursuing its own interests. In tenure review those interests are set out in s24 CPLA. The Crown cannot approach or participate in

[33] See: ***Wellington International Airport Limited & Ors v Air New Zealand Ltd & Ors*** HC Wellington CP403/91, 6 January 1992, McGechan. Referenced in CPLA context in ***Kyeburn Downs Ltd & Ors v Commissioner of Crown Lands*** CIV-2008-412-000197 (HC).

consultation in a way that secures outcomes contrary to s24 CPLA. To do so would be undertaking process mandated by the CPLA in a way that is unlawful under the CPLA[34].

DECISION-MAKING

16 EDS is concerned that an incorrect and so unlawful approach to decision-making has been applied to tenure review to date. Set out below is its understanding of correct legal process.

S25 CPLA: decision-making framework

17 S25 sets out the framework for decision-making on tenure review. In undertaking any action as part of the tenure review process the Commissioner must "*take into account*":

- The objects of Part 2 CPLA. These are set out in s24 CPLA.
- The principles of the Treaty of Waitangi.
- In relation to land used or intended to be used by the Crown that purpose of that use.

18 Central to the application of s25 CPLA is interpretation of "*must take into account*". EDS considers that the following interpretation applies:

- The obligation on decision-makers to "*take into account"* the listed considerations is mandatory – it "*must*" be done[35]. Failure to do so is unlawful[36].
- Although the weight to be given to each of the listed mandatory considerations is a matter of discretion for the decision-maker[37] the Commissioner cannot reject a mandatory

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[34] This issue has been succinctly addressed by Professor Barton in analysis commissioned by the PCE in *Legal Aspects of High Country Pastoral Leases and the Tenure Review Process: A background paper*, Barry Barton, July 2006 (Report for the PCE) at pg 30:
"*(i)* ***consultation does not require neutrality****. It requires openness to what the consulted party has to say, and it requires fairness in making sure that the consulted party can provide its input effectively. But it does not prevent the consulting party from having policies of its own. While it would be wrong to consult on a proposal that it had no intention of changing, it can certainly consult on the basis of a proposal that is consistent with its usual policies, and which it intends to put into effect if nothing in the consultation is enough to make it change its mind.*
(ii) ***A party that must consult can also pursue its own interests****. Consultation need not deter a party from making a decision consistent with its own interests. Wellington International Airport Ltd v Air New Zealand Ltd [1993] 1 NZLR 671 (CA) is a good example – a commercial enterprise with profit as its motive was obliged by statute to consult the main users of its facilities as a restraint on its behaviour as the owner of an effective monopolist; but it was not obliged to obtain their consent to its prices. The veto power of the Commissioner – the power to withdraw from a tenure review at any time before the substantive proposal – is not compromised or watered down by reference to his or her duty to consult certain parties at certain points in the tenure review process.*
(iii) ***A party who must consult can also negotiate****. It is often said, rightly, that consultation is not negotiation. But the existence of a duty to consult does not prevent a party from negotiating as well if it thinks fit to do so and is not legally prevented from doing so. It can negotiate with the parties to be consulted, or with other parties.*
(iv) ***A party who must consult can also advocate****. It is commonplace in administrative law to find a decision-maker who is pursuing a definite policy, and is entirely at liberty to do so even while exercising statutory powers of decision. A usual case is a minister of the Crown who has been elected and appointed on a party policy platform. The cases generally hold that the decision-maker must exercise the power as Parliament had intended, and that usually requires him or her to be openminded, and willing to change or adapt the policy, or even abandon it.* ***But the decision-maker is not wrong to have a policy and to advocate for it****. Indeed, in government and administration we would often expect nothing less from conscientious officials.*
(v) ***The decisions that result after consultation can certainly favour one interest over another****. Indeed, a decision of any kind will inevitably do so. And the presence of a duty to consult in the procedures leading to the decision makes no difference to the range of decisions that can lawfully be made.*
(**emphasis** added).

[35] *Constitutional and Administrative Law in New Zealand,* 4th Edition, P A Joseph, Ch23.2.3(4) pg 953-955: Mandatory considerations may not be "*rebuffed … by a closed mind so as to make the statutory process some idle exercise*" (***NZ Fishing Association Inc v Minister of Agriculture & Fisheries*** [1988] 1 NZLR 544 (CA) at 551, quoted with approval in ***A-G v Refugee Council of New Zealand*** [2003] 2 NZLR 577 (CA) at 608).

[36] Failure to consider a relevant matter.

consideration under s25 CPLA or give it no weight. Actual provision must be made for each consideration[38].

- In reaching and recording a decision mandatory considerations must be weighed on a "*fine grained basis*", "*openly and transparently*", or risk a finding of "*no weight*". Decision-makers should specifically refer to mandatory considerations and evaluate each consideration in turn. Failure to do so is a strong indication of a failure to engage in genuine evaluation[39].

- Considerations that are not listed in s25 CPLA cannot be taken into account. The considerations listed are comprehensive and detailed by virtue of reference to s24 CPLA[40]. Ability to consider extraneous material is limited to information necessary to inform assessment of the listed considerations. Any material must be consistent with the hierarchy of objects of tenure review[41].

- The requirement to "*take into account*" in s25 CPLA does not apply to s24 CPLA. It applies only to what is to be looked at in decision-making under Part 2 generally. The "*take into* account" balancing exercise cannot be transposed into s24. There is no ability to consider the different elements of s24 and give some greater weight over others. The hierarchy in s24 CPLA bites. S24 CPLA prescribes that ecological sustainability and protection of SIVs are the primary goals of tenure review. Those objects cannot be compromised.

S24: Objects of tenure review

19 Under s25(1)(a) and (2) the Commissioner must "*take into account*" the objects of Part 2 CPLA.

20 EDS is concerned that the objects in s24 CPLA have been misinterpreted and so unlawfully applied. It considers:

- <u>S24 contains a hierarchy which must be applied</u>. S24 "*is not about balancing competing values; it has an internal structure that avoids that"*[42]. Promotion of managing reviewable

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[37] *Constitutional and Administrative Law in New Zealand,* 4th Edition, P A Joseph, Ch23.2.3(4) pg 953-955: However the weight to be given to mandatory considerations is a matter for the decision-maker: (***Valuer-General v Wellington Rugby Football Union Inc*** [1982] 1 NZLR 678 (CA). Most recently applied in ***Minister of Immigration v Al Hosan*** [2008] NZCA 462, [2009] NZAR 259 at [66].)

[38] The Court has been clear that ultimately which meaning applies depends on context. It is a matter of statutory interpretation: ***Bleakley v Environmental Risk Management Authority*** [2001] 3 NZLR 213 (HC) at [72]. In some situations, for example, where there is a deliberate legislation contrast between directions in different purpose sections e.g. take into account v recognise and provide for (as per RMA) a consideration subject to a take into account directive can be given no weight. In other situations the phrase has been held to require actual provision be made for the factor concerned. Interpretation of "*take into account*" that requires actual provision to be made for each factor must apply to the CPLA. It does not contain a second or alternate decision-making provision requiring that certain factors be considered in a more directive way (e.g. recognised and provided for). The only decision-making provision that applies to all stages of the tenure review process is s25 CPLA and it states the Commissioner "***must*** *take into account"* the factors listed (**emphasis** added). The first factor is "*the objects of*" tenure review. The objects are multifaceted. They address the public interest in environmental protection and leaseholder interests. They are arranged in a hierarchy and environmental protection is given precedence. Where the factor that must be taken into account is the underlying object(s) of a statutory process it cannot be Parliament's intention that it can be cast aside in preference for other, unlisted, objects. Particularly when that object along with other listed decision-making factors cover multiple interests: public, private, Maori, Crown. For the Commissioner of Crown Lands to be able to take the objects of tenure review into account and ignore them would render the tenure review process farcical: the objects in s24 CPLA may as well be deleted.

[39] *Constitutional and Administrative Law in New Zealand,* 4th Edition, P A Joseph, Ch23.2.3(4) pg 953-955 quoting relevant case law at footnotes 134-138.

[40] *Constitutional and Administrative Law in New Zealand,* 4th Edition, P A Joseph, Ch23.2.3(4) pg 953-955 quoting relevant case law at footnotes 134-138.

[41] The Commissioner's discretion to consider other factors or information is fettered. Statutory powers are given for an object/purpose and their exercise must always promote that object/purpose: *Constitutional and Administrative Law in New Zealand,* 4th Edition, P A Joseph, Ch23.2.3 pg 941; *Constitutional and Administrative Law in New Zealand,* 4th Edition, P A Joseph, Ch22.7 pg 895 referencing ***Unison Networks Ltd v Commerce Commission*** [2007] NZSC 74, [2008] 1 NZLR 42 at [53].

[42] *Legal Aspects of High Country Pastoral Leases and the Tenure Review Process: A background paper*, Barry Barton, July 2006 (Report for the PCE) at pg 29.

land in a way that is ecologically sustainable and protection of SIVs sit at the top of the hierarchy. Sitting underneath (or "*subject to*") is the subordinate object of enabling reviewable land capable of economic use to be freed from the management constraints (direct and indirect) resulting from its tenure under a reviewable instrument. That objective does not necessitate freeholding. Multiple management techniques are available[43]. Sitting under that are the third tier objects of making easier public access and freehold disposal of reviewable land. There is also a hierarchy in respect of how protection of SIVs should be achieved. Return of pastoral lease land to Crown ownership and control is preferred over other protective mechanisms.

- Promotion of ecological sustainability requires affirmative action[44] [45].

- An accurate, clear, and scientifically derived definition of "*ecological sustainability*"[46] is imperative if tenure review is to avoid perverse outcomes and the s24 objects are to be achieved.

- The relevant ecosystem is that at the time tenure review is occurring. There is no express reference that ecosystems are indigenous. But indigeneity is strongly implicit. The relevant ecosystem is that at the time tenure review is occurring. It is the ecosystem naturally occurring in the particular area. For example, in the Mackenzie Basin the mosaic of cushion mat, shrub and tussock grassland vegetation and associated fauna in its different manifestations is determined by the Basins ecotone gradient. That ecosystem may thrive in conditions that are not conducive to productive use e.g. shallow, dry soils are a natural part of the Basin. The relevant ecosystem is not the ecosystem that would exist subsequent to human manipulation to facilitate intensified farming that is to be sustained.

- Enabling protection means to make something possible.[47] It requires positive action. Meaning of protection should be assessed by reference to the Conservation and Reserves Act[48].

- Protection of SIVs by restoration to full Crown ownership and control must be preferred.[49]

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[43] S40 CPLA.

[44] *Legal Aspects of High Country Pastoral Leases and the Tenure Review Process: A background paper*, Barry Barton, July 2006 (Report for the PCE) at pg 25.

[45] In the RMA context the meaning and strength of the requirement to promote sustainable management under s5 RMA was recently considered by the Supreme Court in ***EDS v NZ King Salmon Co*** [2014] NZSC 38. Its commentary is useful for interpretation under the CPLA:

[21] Part 2 of the RMA is headed "Purpose and principles" and contains four sections, beginning with s 5. Section 5(1) identifies the RMA's purpose as being to promote sustainable management of natural and physical resources. The use of the word "promote" reflects the RMA's forward looking and management focus. While the use of "promote" may indicate that the RMA seeks to foster or further the implementation of sustainable management of natural and physical resources rather than requiring its achievement in every instance, the obligation of those who perform functions under the RMA to comply with the statutory objective is clear. At issue in the present case is the nature of that obligation.

The CPLA is similarly forward looking in its focus on future management and use of New Zealand's high country landscapes currently held under pastoral lease.

[46] Not defined by the CPLA. Ecosystem is defined in s2 CPLA: a system of interacting living organisms and their environments.

[47] Oxford Online Dictionary.

[48] This is considered to be the correct approach given qualification for protection under the CPLA is determined by reference to qualification for protection under the Conservation and Reserves Acts: s2 and s24 CPLA.

[49] It appears that an alternative approach may be being applied: The Cabinet Paper supporting the current Strategic Direction for Tenure Review Minute 0927C mandates an approach inconsistent with s24's preference for Crown ownership and control stating: "*Whether the lessee or the Crown is the most appropriate party to protect those values should be considered on a case by case basis, rather than an objective stating a clear preference."* (Cabinet Economic Growth and Infrastructure Committee Paper, A676415 Appendix C Row 2 Discussion Column). That may be the author's or Cabinet's view but it is not the law. Decision-making applying that approach is open to legal challenge.