Address to the QEII National Trust Conference 2025

Thank you for your invitation. I have used it to make myself do some hard thinking about some important issues we need to face.

In the context of a legislative reform programme that includes replacing the RMA, making extensive changes to the Conservation Act and providing ways to fast track all manner of developments to enhance economic growth, the Government has said that it wants legislation to better reflect the enjoyment of property rights.

As experts in the business of covenants, the QEII Trust will know all about property rights. I set out to read a few legal articles that touch on property law and covenanting and rapidly realised just how complex and demanding this field is. There are many aspects of land law in New Zealand that are admirable. The indefeasible nature of registered titles under a state-sponsored regime creates very strong protections and a high level of certainty for those seeking to transfer real property. But it is undeniable that the bundle of rights on which land owners rely in New Zealand depends on statute law. And statute law can defeat those rights through due process – the Public Works Act comes to mind.

When people talk about property rights, I am always curious to know how far they think these rights extend. My curiosity is not academic – I am a landowner myself. I have grown up believing that I have a right of exclusive possession that means I can deny people access to my *private* property. And what I do on my property is my business as long as it doesn't impinge on the legitimate interests of others – most immediately my neighbours. That hasn't stopped governments passing acres of legislation telling me *how* I must go about my private business on that land.

Buildings have to meet minimum standards. Swimming pools have to be fenced to protect children. Similarly, when it comes to using the natural resources that are found on my property, there are plenty of carve-outs. While I have exclusive possession of my slice of the land, I don't own the air or the water that flows over it. I can sell sand, but I can't sell uranium – the Government owns that. And then there's the question of rights to subterranean space if someone wants to build a tunnel.

The consequences of using natural resources – air, soil and water – are often difficult to contain within the boundaries of a single property. So even if I did own them, I'm constantly accountable for the consequences of my actions as they may affect others. I don't regard myself as having a right to pollute water or a right to impose smoke or spray drift on neighbours. And that's not a matter of modern environmental conscience. For over two centuries the courts have dealt with nuisances such as polluted air and water, noise, the escape of fires, pests and noxious substances.

I'm sure most of us would consider that we have a right to the reasonably peaceful enjoyment of our properties without having to cope with clouds of dust, ground water poisoned by leachate or vegetation killed by drifting herbicide. The only trouble is that enforcing that claimed right can be expensive, employing experts to prove causality and lawyers to prosecute the case in court. Sheer practicality has driven us to legislate for rules that provide certainty for all comers. My property rights are limited by rules that are designed to manage the frictions of a modern, mobile society in which there is the possibility of all manner of unintended consequences from people innocently pursuing their rights to use their property.

Of late, the rules themselves have become a source of friction. We now have a new Ministry for Regulation that could play a very positive role addressing some of those frictions. But a Ministry for Regulation can't define where property rights should start and stop. That's a matter of political philosophy and there are no tablets of stone waiting to be discovered which will reveal their final extent. Property rights are, inevitably, founded in the deliberations of our democratic institutions. And I would observe, in passing, that societies that have tried to manufacture tablets of stone called constitutions don't seem to me any safer than those, like ours, that have relied on convention and civility.

Now what does all this have to do with you. Well, the Trust exists, as a result of democratic deliberations back in 1977, to protect valued natural features and open spaces through covenants. Over time, biodiversity has become an increasingly important focus of protected covenants. The concern back in the 1970s was that today's efforts needed to outlive the good intentions of today's property owners and that we could, through statute, make it easier to give permanence to the protection of special places and the biodiversity and other values they shelter. There is a bundle of interesting suppositions tied up there. One is that people in the current generation should be able to commit future generations to an act of conservation today. Another, is that that protection must commence with the free, voluntary actions of a property owner.

The question I'd like to ask today – and I don't have an answer – is whether a further proposition lies under the surface here: that property owners own the biodiversity on their land and have the right to destroy it. I don't consider that I have a right to destroy biodiversity. But that's a personal view. Others clearly think they do have a right to destroy it.

Many people are probably somewhere in the middle and think it's a matter of degree. Most people feel they own the vegetation on their property, and they can do what they like with it but harvesting native timber is strictly controlled under the Forests Act. The law provides a lot of protection for indigenous fauna – at least the larger variety– birds and reptiles. The legal situation is fuzzier for indigenous insects. The different treatment of various bits of our biodiversity overlooks the fact that plants, animals and insects are all interdependent. It's hard to protect separate bits.

As I've said, I'm not going to answer a question that comes down to a matter of political philosophy or values. What I *do* want to do is explore the consequences of what a move to affirming property rights at the heart of environmental legislation might mean for biodiversity protection. Because there's no question that for a long time now it has been assumed that even if a landowner doesn't want to protect biodiversity – let alone seek to covenant it – the community, through the Resource Management Act, has the right to protect biodiversity through regulation.

Trying to advance that regulatory framework has been slow and contentious, but the clear statement by the Government that it will place the enjoyment of property rights at the heart of its reforms re-opens that debate. While the detail is still unclear, we may well soon find ourselves debating whether the right to remove biodiversity can only be constrained if compensation is paid for any loss that may flow from not being able to use the land differently.

Let me outline some of the pros and cons and consequences of regarding biodiversity in this way. I'm going to assume, for the sake of argument, that the right to *protect* biodiversity by covenant isn't problematic – although the Public Works Act can over-ride that right as can elements of the new Fast-track Approvals Act. Let me focus instead on the arguments in favour of or against a right to *destroy* biodiversity. There are some uncomfortable realities that both sides of this debate have to contend with.

On the pro-side, asserting a right on the part of landowners to clear bush or drain wetlands unless compensated, forces those who wish to protect the biodiversity to focus on what's really important. If the removal of the asserted right would require monetary compensation, people – whether elected politicians or environmental groups seeking donations - are going to have to ask themselves just how important any particular piece of remnant biodiversity is. When resources are limited, compensation is likely to be used sparingly.

An additional benefit of this approach is that focusing on the value of the biodiversity in question is likely to mean that its on-going protection is likely to be properly considered. Our indigenous biodiversity is under attack from a wide range of pests like possums and goats and invasive weeds. There's no point making the case for compensating someone for retaining biodiversity if, in the absence of resources, it is destined for a similar fate, just more slowly.

The arguments *against* claiming a right to destroy biodiversity are sometimes couched in terms of a shared heritage and a responsibility to care for the world we live in and the other species we share it with. These arguments have a distinctly ethical flavour and appeal to many people as self-evident. But if you're looking for reasons, a more transactional case can be advanced: that it is in our human self-interest to protect biodiversity because the ecological services it delivers – like pollination - are services we all rely on.

These services often accrue to third parties so it is possible to raise an argument that the right to destroy biodiversity should be limited in the same way that the right to use property doesn't extend to harming others. Biodiversity is part of a living web. Something that appears to be a remnant in the landscape may still be providing vital support for birds which live on neighbouring properties, or controlling the flow of water or the loss of soil which would otherwise burden landowners downstream.

Very few environmental impacts stay neatly within the boundaries of properties – and that includes biodiversity. So maybe a claimed right to compensation would have to be discounted to take account of the harm removing biodiversity might do to others. Again, this could be a very costly matter to settle through the legal system. And some would argue that 'others' are in fact everyone since biodiversity is a common heritage providing benefits to all. So why not just regulate?

But let me quickly note that the case for regulation has its own shortcomings. If landowners don't 'own' biodiversity and therefore have the right to get rid of it, what responsibility do they have to look after it? It costs money to fence areas and control pests and weeds. The Crown can't even do a half good job of maintaining the ecological values on much of its own vast estate (much, but not all of it, administered by DOC). If the Crown doesn't look after its own property, why should it tell others how to manage theirs? And what is the point of 'saving' remnants that, in the absence of sufficient scale are probably doomed to slow collapse.

Furthermore, if regulators are going to tell people that remnants of our biodiversity in private hands are highly valuable, then they should be able to back that claim up with evidence of that value. But successive attempts to document our biodiversity so that we can prioritise those elements most at risk have foundered. For example, in the early 1980s a Protected Natural Areas Programme was established to survey all 268 ecological districts in New Zealand. The idea was to identify and protect a representative sample of all natural ecosystems. These surveys identified Recommended Areas for Protection (RAPs). After two decades, the programme was quietly shelved having got through just 95 or so of the 268 districts.

A successor initiative was the identification of Significant Natural Areas by local councils under the RMA. From the outset it was opposed by some landowners who regarded it as an impingement of their property rights. And iwi have regarded the efforts of some councils as telling them how to manage their own land regardless of their rangatiratanga or of tikanga. After a further two decades, that effort also seems to be grinding to a halt with the Government suspending any further surveys for three years.

We lack a comprehensive idea of what's at risk. In 2007 it was calculated that of the 500 land types in the Land Environments of New Zealand (LENZ) database,

232 (46%) had less than 20% of their area remaining in indigenous vegetation. Over 80% of those land types had no formal protection.

The area of indigenous vegetation and habitat remaining on New Zealand's primary agricultural lands continues to decrease but estimating how much and the causes has proved difficult. A survey of vegetative change between 1989 and 2015 in 856 of the areas recommended for protection under the PNAP covering just 35 of the ecological districts found that 2.3% of the area in question had been cleared.[1] Calculating that number was tricky, requiring the comparison of many satellite images. Given that the PNAP was never completed, we just don't know what in total has been lost.

Whether it is a matter of understanding accurately what needs to be protected or actually providing the protection, all roads lead to **a chronic lack of resources**. Whether we wish to regulate or compensate, the resources aren't there and without them drawing lines on maps won't make much difference. We have to address how we can find the resources needed to go on protecting what has already been set aside and the most important unprotected biodiversity. That applies whether or not you believe people have a right to destroy biodiversity.

Conservation work has a cost attached to it. This is most obvious for restoration projects, where land, plants, fencing, and pest control are all typically required. But it is also true when it comes to protecting the biodiversity that already exists. That is because retaining an existing ecosystem on any given piece of land also comes with an opportunity cost – the foregone economic output that could be generated (whether from farming, solar panels, mining, or any other activity). Depending on the property rights regime in place, these opportunity costs will either need to be met by the landowner or some other party or parties with an interest in seeing the ecosystem retained.

There is no shortage of instances where the costs of conservation work have been met philanthropically. A community group giving its time for pest and weed control for example. Or, as will be most familiar to this audience, a landowner choosing to forego potential economic gains in order to protect a pocket of biodiversity in perpetuity.

I'm well aware that the QEII Trust is faced with many more opportunities to protect biodiversity than it has funds to do the job. In my view, it seems highly unlikely that there is sufficient goodwill to solve all of New Zealand's biodiversity challenges without support. That requires us to turn our minds towards other sources of funding – both private and public.

Let me focus first on private funding. You will all no doubt be aware of the recent surge of interest in biodiversity credits and offsets. Myriad different schemes and

[1] Monks, Hayman and Walker (2019)

design options have been proposed. At their core though, the underlying premise is the same: private interests perceive enough value in biodiversity restoration or retention to justify contributing financially to its costs. This value flows from one of three sources:

- Direct benefits: these are the familiar improvements in forest health and bird life that local people value enough to chip in and protect something of value to the community.

- Reputational benefits: these are benefits that businesses go after to unlock market premiums by marketing products to consumers whom they believe want environmental assurances.

- Regulatory benefits: these involve allowing someone to damage biodiversity in a specific location provided offsetting biodiversity benefits are delivered elsewhere. Depending on the extent of those benefits, offsetting can deliver a net gain.

It remains to be seen how widespread corporate interest in greenery is, and whether it will be enduring. I'm sure there are opportunities for food companies to work with growers to produce certifiable products that include the protection of nature. But I am sceptical about many of the biodiversity credit schemes being promoted. Biodiversity is very hard to measure and if offsetting is involved it is not always easy to be sure that there is a net gain. Delivering high quality credits will not be straightforward.

So what about public funding? Philosophically at least, the public good characteristics of biodiversity restoration and retention projects provide a clear rationale for this. The practical questions are about which level of Government is involved and how revenue is raised.

I am aware of a number of councils that provide direct subsidies for wetland and riparian restoration in rural parts of New Zealand. I am also aware of central government funds being directed to improving biodiversity outcomes. The trouble with much of this expenditure is that it occurs on a one-off basis and isn't necessarily targeted at the most threatened ecosystems.

It is the easiest thing in the world to argue that taxpayers or ratepayers should fund things - leaving our elected representatives to make the hard choices. I have tried during my time as Commissioner not to bleat on about the need for more money because I am not confronted with the trade-offs that politicians must make. I have focused instead on making sure they are aware of the environmental consequences of not giving priority to environmental matters.

But I don't think it's inappropriate to suggest ways in which better environmental management could see that polluters rather than general taxpayers pay for environmental restoration. The most obvious and easy source of funding – at least in the short to medium term – is the Emissions Trading Scheme. I have argued that forestry should be removed from the ETS so that the carbon price drives real emissions reductions. A steadily rising carbon price would mean that auctions would clear and the Government would earn income from the sale of units. That income could fund biodiversity restoration.

Tax purists don't like tying taxes to specific purposes. I, for my part, think there is a certain elegance about asking today's climate polluters (that's you and me) to contribute to restoring indigenous forests whose removal, in the early and middle years of the twentieth century, represents by far New Zealand's biggest contribution to the stock of carbon dioxide in the atmosphere. Remember too, that much of that destruction was funded through taxpayer subsidies.

We could also consider some sort of environmental levy based on the intensity with which land and water are used. An earlier generation felt quite relaxed about paying differentiated rates to secure the benefits of drainage. I still pay my regional council drainage rates based on the extent to which I am a contributor or a receiver of water. Why couldn't we consider environmental levies designed to secure environmental benefits?

As those of you who have read my report *Going with the Grain* will know, I think the only way to make real progress on water quality and biodiversity protection on the ground is with the active engagement of the people who live on the land. The catchment or sub-catchment is the appropriate level on which to focus attention. Catchment groups have already achieved a great deal where there has been strong local commitment. But it takes time and money both to run such groups and to fund remedial action which may not fall equally across properties. A levy could redistribute the burden from the most intensive resource users to those who bear the brunt of restoration action. If we had a levy, I'd suggest that catchment groups – the people who pay it – should get to spend it.

I haven't elaborated my thinking on this topic – it would be better for others to pick up the challenge of exploring how the governance of such a system would work. But I offer it as a practical suggestion about how we can ensure a reasonable level of funding to secure better biodiversity and other environmental outcomes – whether we're using regulation or private arrangements to compensate those who forgo any alleged 'right' to destroy biodiversity.

Because the reality is that without resources we will leave the protection of many endangered ecosystems to chance. For a country with such a remarkable biodiversity inheritance, that would be a shocking abdication of our responsibilities to the land on which we all depend and to future generations.