AVONDALE JOCKEY CLUB
(Incorporated)

11 February 2020

Committee Secretariat
Transport and Infrastructure Select Committee
Parliament Buildings
WELLINGTON

BY EMAIL: TI@parliament.govt.nz

Dear Sir / Madam,

Submission on Racing Industry Bill 2019
Submitter: Avondale Jockey Club Incorporated

This submission by the **Avondale Jockey Club Incorporated** ("**AJC**") is in respect of the Racing Industry Bill 2019 ("**Bill**").

AJC was established in 1889. It quickly set about developing a racetrack and ancillary facilities on its property in Avondale and held its first race meeting on 26 April 1890.

The Avondale Racecourse is an 1800-metre long right-handed track, together with grandstands, stables and associated facilities. The track is one of the best in the country, being less prone to full or partial abandonments than most other venues where significant investment is required to improve reliability issues. The racecourse infield area is developed for sports fields which have been used by the local community for over 50 years. The property is also home to the famous Avondale Sunday Markets.

AJC's submission is as follows:

1. THE AUCKLAND CONTEXT

1.1 The Avondale Racecourse is one of only two "inner city" tracks in the Auckland Region, the other being the "premier" venue at Ellerslie. The third "Auckland" course is Counties, in Pukekohe.

1.2 It has been clear for some time that many industry stakeholders see the greatest value of Avondale Racecourse in the funds that might be released from its sale to invest in broader national racing facilities and interests. Essentially, it has been proposed that wealth held in inner-city West-Auckland should be taken and redistributed to the benefit of more generic industry interests. The "Messara Report", which the Bill is intended to give effect to, makes no secret of this fact, referring in number of places to the potential value that would be released to the industry through the rezoning and sale of the "extremely valuable" freehold land. AJC notes that, in preparing his report, neither Mr Messara nor any person working with him met with AJC to discuss its own intentions for its land. AJC considers that this failure to consult with it in respect of matters of such import for the club and community in which the Avondale Racecourse is located is a fundamental failure of process and given

the implications of the recommendations made in the report is inconsistent with principles of natural justice.

1.3 In January 2019, New Zealand Thoroughbred Racing ("**NZTR**") released its "NZTR Venue Plan – a Document for Industry Consultation" ("**Venue Plan**"). The Venue Plan, while carefully not addressing the issue of the proposed expropriation of AJC's (or any other) property, continued in a similar vein by identifying the Avondale Racecourse as "surplus" and proposing that allocation of licences for race meetings be reduced to zero on or before the 2024/25 race season. The Venue Plan comprises a power point presentation which summarises "principles", "tactics" and "potential outcomes" before making significant recommendations as to the allocation of race licences and the closure of venues that NZTR considers surplus.

1.4 AJC made a comprehensive submission in respect of the Venue Plan, setting out its own rationale for why the retention of two metropolitan racetracks in Auckland would be a better approach for the New Zealand racing industry, as well as how AJC is ideally placed to leverage off its location and self-fund a racing proposition to the benefit of the national industry and Auckland racing in particular.

1.5 In short, AJC submits that to attract new participants (and thereby investment) into the racing industry, potential new participants must be provided with a high-quality racing product in an accessible location – ie, as close to practicable to where they live. On this basis, it is in the centres of population growth (ie, the cities) that the thoroughbred industry must focus on providing high quality venues to generate new interest in the industry. This approach would be consistent with recommendations made to the Jockey Club USA in 2018 by leading international consulting firm, McKinsey. McKinsey carried out research and recommended a major strategic plan to save the faltering industry in the USA. The report identifies, among other issues, potential customer development in relation to venues:

(a) *"Ensure major league cities have major league tracks."* McKinsey says it is imperative for the future of racing that the industry upgrades the track experience **in centres of major population**;

(b) *"Develop plans in the Jockey Club USA to consider becoming a track owner, lessor or partner when a significant racing venue is imperilled."*

1.6 AJC says that these conclusions suggest that a better approach to the rejuvenation of the racing industry in New Zealand would be to ensure that Auckland's venues are retained and enhanced. Avondale is centrally located within an area earmarked for intensive commercial and residential rejuvenation. AJC has successfully achieved significant "upzoning" of parts of its land through the recent Auckland Unitary Plan process and is accessible by good and ever-improving transport links including public transport. AJC is therefore well placed in Auckland's inner-city to provide a high quality "shop front" and attract new punters and participants to the industry. Closure and redistribution of the value associated with the Avondale Racecourse is counter-intuitive and inconsistent with the approach recommended by McKinsey in the USA context, which AJC says is analogous, albeit at a lower scale, to the New Zealand context.

1.7 Auckland can and should sustain two high quality Metropolitan Racecourses, acknowledging that Ellerslie should be considered the premier venue and Avondale should play a supporting role as a "sub premier" venue. If an industry focus on provision of high-quality racing in Auckland is pursued, Avondale Racecourse is well placed to play a role within Auckland as a "sub-premier" venue, providing easily accessible racing and trialling on its existing reliable turf. High quality but lower scale facilities constructed at a rationalised Avondale Racecourse would provide an attractive counterpoint to the more upscale and arguably upmarket facilities provided at Ellerslie, while retaining the benefits of a metropolitan Auckland location. Diversification of the racing product and experience will be the key to the sport's enduring success. AJC has developed a strategy to deliver this high-quality racing infrastructure, together with supporting and ancillary services and

activities that can deliver a level of on-course experience that is secondary and complementary to the continued central role played by Ellerslie.

1.8 AJC acknowledges that enactment of the Bill as proposed does not strictly require the compulsory sale of Avondale. However, AJC says that will be the inevitable result, given the intended outcomes of both the NZTR Venue Plan and the unabashed language used in the Messara Report. AJC says that this approach is short-sighted, opportunistic and not in the benefit of the racing industry in the long term, and asks that the Committee carefully consider that fact in preparing its report in respect of the Bill.

2. RACECOURSES AS "INDUSTRY" ASSETS

2.1 The Explanatory Note to the Bill provides:

> *The Bill introduces a suite of changes that will resolve historic property issues that have contributed to the decline of the industry. Two property objectives are introduced to guide decision making: the value of racing property should be retained in the industry, and the value of racing property should be used for maximum industry benefit.*

2.2 Similarly clause 3 sets out the purposes of the Bill and provides:

> *The purposes of this Act are to—*
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> *(a) reform the law relating to New Zealand racing in order to—*
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> *(i) provide effective governance arrangements for the racing industry; and*
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> *(ii) promote the long-term viability of New Zealand racing; and*
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> *(iii) facilitate betting on galloping, harness, and greyhound races, and other sporting events; and*
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> *(iv) ensure that the value of racing property is retained in the industry and is used for maximum industry benefit; and*
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> *(b) prevent and minimise harm from gambling conducted under this Act, including harm associated with problem gambling.*

2.3 These excerpts suggest the reforms in Part 2 are based on assumptions that racing is a purely national pastime and that club property is not owned outright, but is owned for the benefit of the sport of racing as a whole.

2.4 These underlying assumptions are false. Racing is both a national and a local pastime. Many racing clubs such as AJC began as small associations of people who pooled their resources specifically to carry on racing in, and for the benefit of, their local communities. Racing venues are often used as community hubs. Furthermore, the social value inherent in Racecourse assets to the communities in which they are located go far beyond the pure economic value such assets may have to the racing industry. The Bill completely fails to take account of this social value.

2.5 AJC has been racing for 130 years. As well as a venue for racing, the Avondale Racecourse land comprises a significant community asset. It provides much needed green space within a rapidly intensifying area, the infield is used for active recreation by the community, its facilities are utilised by small community groups and the racecourse is the site of the famous Avondale Sunday Markets. Again, the Bill almost entirely disregards these core community values and the contribution that racecourse assets make to their communities. Instead effectively treating venues as dedicated racing infrastructure alone.

2.6 Membership in a racing club is not necessarily substitutable. Many members of clubs, including the majority of AJC's members, affected by dissolution or the expropriation of their

venues will not be willing or able to continue participating in racing through another club or at another venue. This may especially be the case where the nearest club permitted to carry on racing is a significant distance away, but may also reflect compatibility in terms of culture/approach. There is some limited crossover in membership between AJC and its counterpart at Ellerslie. However, many existing AJC members have said they would not join the Auckland Racing Club if AJC were dissolved, and nor would they maintain their AJC membership if the Avondale Racecourse were closed and AJC required to race at Ellerslie.

2.7 Furthermore, while many club assets are held in structures where the legal owner of the property is required to apply the property for specific higher purposes (such as incorporated societies and charitable trusts) that is not true of all clubs, and even clubs which are structured this way do not all serve the same purposes. Most clubs, including AJC, have purposes which expressly include serving their local communities.

2.8 It follows that dissolving and/or expropriating the property of local clubs will not involve moving property around one system with a common purpose. It will involve the forcible taking of property currently applied for specific community purposes, and applying it for other purposes. The impacts of those transfers will not be "zero sum", and will benefit some clubs at the expense of others. Constitutionally and legally, in accordance with precedent going back to the fifteenth century, those impacts must be recognised by some form of compensation. This issue is addressed in more detail below.

2.9 Relevant to the Committee's assessment of the underlying premise behind this Bill, ie – that "industry funding" has supported continued activities by racing clubs, must be considered in light of the following:

(a) The NZTR funding model pertaining to all thoroughbred racing in New Zealand is based on a "command model" designed to achieve various outcomes, including that clubs holding "industry days" are able to break even on those particular days.

(b) The funding model operates in a monopoly environment in which NZTR funding is part of a "money-go-round". Industry day clubs have no rights in relation to income they generate from racing, and the bulk of the costs of holding races are passed through the club by NZTR.

(c) The only significant money made available by NZTR to racing clubs is in respect of "premier" race days. Clubs that run these days are able to make a profit from those fixtures, unless underlying racing infrastructure has too high a cost to run.

(d) In AJC's case, it is not allocated any race days other than "industry days". This means there is no mechanism for AJC to make a profit. It generally breaks even on its race dates only. All industry day clubs, including AJC, get the same level of race day funding from NZTR, so there can be no argument that some industry day clubs are more of a drain on the industry than others, unless there is additional funding given to struggling clubs that do not operate within the funding provided to run the race day. If this is the case, AJC is not aware of it. AJC has not and does not receive any funding additional to the funding model.[1]

(e) AJC has received no grants, gifts or funding contributions from NZTR outside of the racing funding model, other than partial funding for a report prepared by Turnberry

[1] Note: AJC has received on occasion benefitted from funding received from the "Safety Development Fund" managed by the Department of Internal Affairs. Rules dictate that projects contributed to by the SDF must be at least 50% funded by the club itself. The fund has a prescriptive element relating to NZTR's integrity and welfare obligations as the governing body of the industry. Accordingly, AJC considers such funding does not constitute financial support by NZTR.

Consulting Limited in 2014/15 relating to a possible strategic rejuvenation of AJC's racing infrastructure. Despite the recommendations in that report, NZTR now seeks the closure of the Avondale Racecourse.

2.10 Notwithstanding the above, and as noted in its submission to the NZTR Venue Plan, despite under-allocation of race licences over the last decade, AJC is in a position where it can self-fund its redevelopment and rejuvenation. Assuming a fair allocation of race licences going forward, AJC does not require additional industry investment moving forward.

2.11 For the reasons given above, AJC says the underlying basis on which the promoters of the Bill allege that club assets are industry assets is flawed. The industry does not and has not provided significant financial support to AJC.[2]

3. LEGAL/CONSTITUTIONAL ISSUES

3.1 Part 2 of the Bill confers powers on racing codes to determine that racing clubs are "no longer racing" and should be dissolved. It also confers powers on codes and the Minister for Racing (Minister) to expropriate club property, and places additional restrictions on how clubs may form and govern themselves.

3.2 These provisions are inconsistent with the fundamental constitutional principle that the state should not expropriate private property without paying compensation. They are also inconsistent with club members' rights to freedom to associate together and form and run racing clubs under the New Zealand Bill of Rights Act 1990 ("**NZBORA**"). AJC elaborates on these submissions below, and makes three submissions for how the Bill must be amended to avoid infringing constitutional principle and the NZBORA.

Expropriation of property

Process

3.3 Clause 19 of the Bill authorises codes to make determinations that clubs are "no longer racing" (clause 19). It then enables the code to arrange for the dissolution of any such club (clause 20), with the assets of the club then vesting in the code (clause 22). A "no longer racing" determination may be made for literally any reason (clause 19(1)(c)). While an affected club must be notified and given an opportunity to "respond" to a preliminary determination (clause 19(2)), these are procedural rights only. There is no right, for example, to appeal any determination to a Court of competent jurisdiction, or to otherwise refer the matter for final determination by an independently appointed hearings panel. This can be contrasted with the provisions of the Public Works Act 1981, which provide for the lodging of objections in respect of proposals for the compulsory acquisition of land, and determination of such land-takes through a full hearing before the Environment Court. This is the case in respect of *any* compulsory land take, even where the area of land affected may be quite small.

3.4 AJC says that the provisions of the Bill fall well short of delivering an appropriate legal process before clubs' property may be expropriated. Furthermore, it is legally and constitutionally inappropriate that the relevant code is able to act as the promulgator, final decision-maker and beneficiary of "no longer racing" determinations.

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[2] AJC notes that other submitters to this process, such as Dr Blue on behalf of the Stratford Racing Club, have also addressed the underlying premises used to justify the Bill. AJC does not repeat others' submissions here. However, it agrees with the tenor of such submissions insofar as they suggest that references to industry support for clubs is exaggerated, and that some clubs including AJC have historically been required to cross-subsidise racing at other venues.

Compensation

3.5 In terms of compensation payable for the taking of AJC's land, the Bill expressly contemplates that the assets of a club may be expropriated without payment of any compensation at all:

(a) Clause 3(b) of the Bill, provides that a purpose of the act is to ensure that "*the value of racing property is retained in the industry and is used for maximum industry benefit*".

(b) Clause 22(3) of the Bill requires that the code "*must consider whether any action (for example, a payment) is warranted to recognise the community interest (if any) in the racing venue or venues of the racing club that are vested in the code"*.

(c) Clause 25(4)(c) requires in the case of a "transfer proposal" only that the code consider whether a payment to a club or community interest is "warranted", and only for limited reasons.

(d) Clause 27(3) expressly provides that a racing club may be required under a transfer proposal to transfer its venue to the code without receiving *any* compensation at all.

3.6 In short, the Bill proposes a scheme whereby the code may decide, for any reason whatsoever and without appropriate due legal process, that a club is "no longer racing" and/or that a venue is "surplus". The code then directly benefits from that decision insofar as the value of the asset will vest in it, without any requirement for payment of compensation either to the affected club or the community in which the venue is located.

3.7 Since the fifteenth century it has been the practice of the English and British Parliaments that whenever legislation is passed authorising the taking of property, to include provision for payment of fair and reasonable compensation. Professor Philip Joseph has noted that what was initially an "expectation of a statutory right to compensation" over the centuries "hardened into a binding rule of constitutional practice".[3]

3.8 That practice has continued to this day, including in the practice of the Parliament of New Zealand.[4] Thus in *Estate Homes Ltd v Waitakere City Council*, the Court of Appeal observed:[5]

> *[Subject] to inconsistent legislation and compliance with the general law, it is the right of every person to use his assets as he pleases and to be compensated if they are expropriated for public purposes. Public sector requirements imposing a disproportionate burden on individual persons are constitutionally improper.*

3.9 The rule that private property should not be taken without compensation has further hardened into a legal principle of statutory interpretation. Since the late nineteenth century, the courts have held that whenever legislation purports to authorise the taking of property,

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[3] Joseph, above n 1 at [18.4.3(5)(b)]

[4] See the series of Public Works Acts enacted in 1876, 1882, 1894, 1905, 1908, 1928 and 1981. As Joseph notes, approximately 10 other statutes also authorise takings but these powers are required to be exercised consistently with the Public Works Act 1981 including the payment of compensation: at [18.4.3(5)(b)].

[5] *Estate Homes Ltd v Waitakere City Council* [2006] 2 NZLR 619 (CA), later overturned in *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149 but on factual grounds.

the relevant provisions must be interpreted as requiring the payment of compensation unless a contrary intention is absolutely clear.[6]

3.10 AJC says that the provisions of the Bill amount to an egregious breach of the rule of constitution practice that any person whose land is expropriated is entitled to fair and reasonable compensation.

Freedom of association

3.11 Section 17 of the NZBORA affirms that everyone has the right to freedom of association. The right extends to corporate bodies such as incorporated societies as far as is practicable.[7] Like most other rights in the NZBORA, the freedom of association may be subject to limits which are prescribed by law and reasonable and demonstrably justified in a free and democratic society.[8]

3.12 As drafted, Part 2 interferes with the rights of members and prospective members of clubs to associate together to carry on racing, both directly and indirectly:

(a) A **direct** interference arises because Part 2 authorises codes to make determinations that clubs are "no longer racing" and may be dissolved.

(b) An **indirect** interference arises because certain provisions in Part 2, while not preventing members from associating together to form racing clubs or permitting the dissolution of clubs *per se*, impose such severe restrictions on the process of forming and operating a club as to amount to an interference in substance. These include those provisions which:

(i) require club constitutions to be approved by codes (without setting out the grounds on which codes may approve or disapprove of a constitution);[9]

(ii) require clubs to comply with (unspecified) criteria for registration set by codes;[10]

(iii) prevent clubs from dealing with their property without the permission of a code;[11] and

(iv) authorise the expropriation of surplus racing venues without the payment of compensation.[12]

3.13 The cumulative effect of the provisions listed in (b)(i)-(ii) is to outsource the key decision-making regarding the structure and operation of racing clubs to codes. The effect of (iv) is

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[6] *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149 at [45] per McGrath J for the Court, citing Taggart, "Expropriation, Public Purpose and the Constitution", in Forsyth (ed) *The Golden Metwand and the Crooked Cord* (1998) at 104-105.

[7] NZBORA, s 29.

[8] NZBORA, s 5.

[9] Clause 8(1)(a)(ii).

[10] Clause 8(1)(a)(iii) and 19(1)(b)(ii).

[11] Clause 17.

[12] Clauses 21, 24-25.

to make all clubs which own and operate racing venues liable to have their operations uprooted with limited notice, preventing them from carrying on racing in any meaningful way.

3.14 AJC says that these limits on the freedom to associate are not "reasonable and demonstrably justified in a free and democratic society" for the purpose of s 5 of the NZBORA. The unreasonableness of the provisions authorising the forcible dissolution of clubs and expropriation of property without compensation has already been generally addressed. The remaining provisions also cannot be justified because they are overbroad. Codes may make "no longer racing" determinations for any reason. Clause 8 imposes no limits on how codes may vet clubs' constitutions or constitutional amendments.

Retrospective effect

3.15 The definition of "**racing club** or **club**" in clause 5 includes a club that "was registered with a racing code". This effect of this definition is that a racing club that has deregistered from a racing code is nevertheless a "racing club or club" for the purposes of the Bill. Accordingly, even if a club has deregistered from a racing code, the racing code may still determine that the club is no longer racing under cl 19(1)(c) with the dissolution and appropriation consequences that follow.

3.16 The result produced is a remarkable one:

(a) It grants racing codes the power to effect the dissolution of clubs that have deregistered, and to cause appropriation of their assets, despite those clubs having no legal or continuing connection to that racing code;

(b) For clubs that have already deregistered from a racing code before the passage of the Bill, the effect of the Bill is to retrospectively create ongoing powers of racing codes over those clubs despite deregistration. A retrospective effect of this nature is inconsistent with the Rule of Law.

3.17 AJC says that the words "or was" should be deleted from the definition of "**racing club** or **club**" in clause 5.

4. *RELIEF SOUGHT – REQUIRED AMENDMENTS TO THE BILL*

4.1 AJC submits that Part 2 should be amended address these the deficiencies identified in the body of this submission.

4.2 The provisions authorising the forcible dissolution of clubs and expropriation of club property cannot be justified in their present form. The Committee should:

(a) Strike them from the Bill; or if that is not agreed, then:

(b) Amend them to remove the ability of codes to make "no longer racing" determinations for any reason;

(c) Provide a clear and transparent legal process for consideration and determination of any objections by affected clubs and communities, such as reference to a panel of independent hearing commissioners; and

(d) Include mandatory requirements that, in the event that a determination is confirmed through the process set out above:

(i) Any club which is determined to be "no longer racing" and dissolved be paid market value compensation for any assets which ultimately vest in the code; and

(ii) Any transfer proposals include a requirement for the payment of market value provision to the club for the racing venue.

4.3 If the Committee is not minded to take either course identified in paragraph 4.2 above, then the Bill should be amended to require that any funds realised from the disposition of the Avondale Racecourse should be applied for community purposes within the Auckland Region.

4.4 Irrespective of any of the relief points set out in paras 4.2 and 4.3 above, Clause 3 requires amendment to include, as a specific purpose of the Bill, recognising and affirming the value that racing clubs contribute to local communities around New Zealand.

4.5 The words “or was” should be deleted from the definition of “**racing club** or **club**” in clause 5.

4.6 Finally, the Committee should remove the requirement that codes approve club constitutions from the Bill, and provide greater clarity on the permissible scope of eligibility criteria codes may set.

Allan Boyle
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