



When the law is silent, Trespassers W...: Law and power in implied property rights

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Chapter 1: In which legal ambiguity

Breeds confusion

And makes way for power and politics





NZ
Crown
pastoral
leases



Assumed to convey exclusive
possession,
but
Black letter law much less clear

The legal setting

- Land is "suitable or adaptable primarily for pastoral purposes only." (*Land Act* 1948)

- "A pastoral lease gives the holder—

- (a) The **exclusive right of pasturage** over the land:

- (b) A perpetual right of renewal for terms of 33 years:

- (c) No right to the soil:

- (d) No right to acquire the fee simple of any of the land."

(*CPLA* 1998 § 4 replacing *Land Act* § 66)

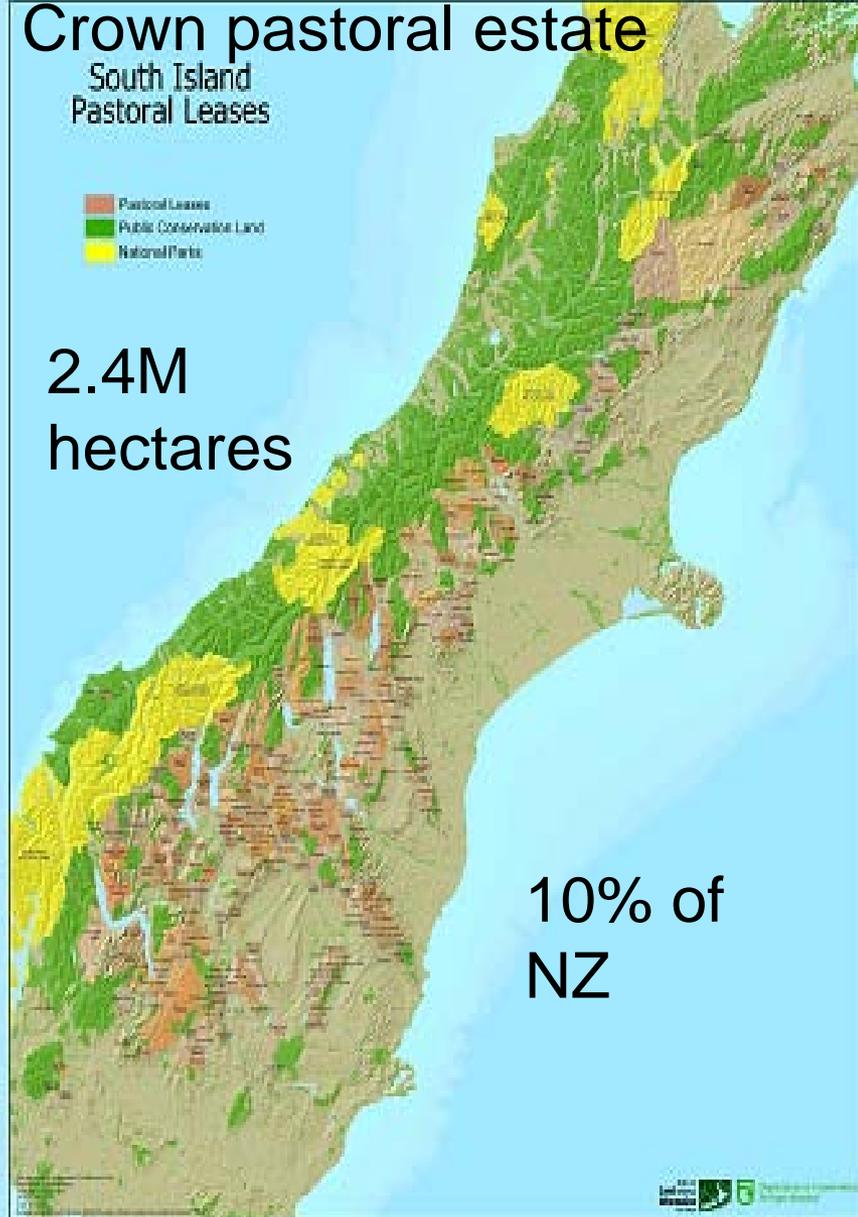
The policy setting

1992-2006: Land reform splits pastoral land:

58% freehold

42% conservation (DoC)

The geographic setting



Why the silence after W?

Common law lease

- Substance over form of a lease
- Other inconvenient leasehold principles:
 - Premises test
 - Residual control test
 - ‘Obviously the Crown must retain some control over it. That is why there is no right of purchase.’ (Hon Mr Skinner, 1948, when introducing the Land Act)
- Respect for persuasive authority of precedent
 - Australian native title cases
- Exclusive occupation or exclusive possession?

Statutory lease

- Lack of explicit conferral
- Statutory scheme
- Differences between freehold, private lease, public lease





Trespassers W on Crown lease land in Oz and NZ

In Oz: Trespassers will be allowed to hunt and fish.

“lack of clarity: ... Some lessees view a pastoral lease as being ‘as good as freehold,’ whereas some ... view leases as ‘public land’ ... to be held in the public interest. ... As a pastoral lease does not necessarily confer exclusive possession, it could, theoretically, accommodate the allocation of different property rights to different individuals.”

In NZ: Trespassers will be prosecuted





- 1 Statutory, not common law, leases.
2. Only rights explicitly written in the statutes exist.
3. Neither land statute explicitly confers exclusive possession.
4. Trespass Act doesn't apply: trespass not a right, but a remedy.
5. At law, recreational access to Crown pastoral lands need not interfere with the existing property right of exclusive pasturage, as long as recreationists respect gates and stock, do not disturb the soil or grass.

Chapter 2: In which Fish and Game Councils trundle up to the High Court, and we develop a theory of implied property



Gilbert van Reenen

Exit black letter law. Enter politics, power, narrative, communication.

When the law is silent, “persuasion becomes property.”

- ① Few v. Many: The Motivated Few more likely to assert an implied right, and more forcefully.
- ② Motivated Few in Oz, NZ, and US use similar strategies:
 - ① Bootstrap private desires to public good
 - ② Use legal language to strengthen claim
 - ③ Tie private desires to cultural icons
- ③ Access and rights need not overlap; access not reliant on enforcement.
- ④ Social norms oddly resilient, even in face of clear law.



When the law is silent, Implied Property will ...

- ① Allow norms, customs, narrative, and persuasion to conspire;
- ② Allow asserted powers to become enforceable rights;
- ③ Allow property law to be more flexible in one direction than the other;
- ④ Benefit the few, advocating private interests, over the many, advocating public goods.



Chapter 3: In which Fish and Game loses, farmers crow, the Government threatens, and our theory is sadly vindicated.

Fish and Game: *Wik* et al relevant because leases identical

Crown: *Wik* irrelevant because Fish and Game not asserting indigenous rights

Farmers: *Wik* irrelevant because it's Australian



Decision: *Wik* relevant, but ...

“Eminent jurists can reasonably disagree...I make no attempt to add to the debate, but note that, with respect, I prefer the minority reasoning.”



“Some spheres of life seem to lie entirely beyond the shadow of the law.”

(Ellickson 1991)

