

PROPERTY LAW IN THE SOUTH ISLAND HIGH COUNTRY – STATUTORY, NOT COMMON LAW LEASES

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I. INTRODUCTION

This article examines the statutory, common law, and traditional foundations of property rights in pastoral leases in order to look at recent changes in government policy regarding the implementation of the South Island high country land reform. Called tenure review, this land reform divides Crown land into two distinct forms of tenure – freehold title and full Crown ownership to be managed for public conservation. Tenure review began inside the bureaucracy of the Department of Lands (now called Land Information New Zealand, or LINZ). The Crown invited holders of pastoral rights to enter voluntary negotiations to determine which land would transfer into freehold ownership, and which would shift into the public conservation estate. In 1998, Parliament granted statutory authority to the administrative process, and formalised the pre-existing rules.

The Crown Pastoral Land Act 1998 (hereinafter CPLA) stated the primary goal of tenure review as ‘ecologically sustainable’ land management in the high country.¹ Subject to the primary goal, the CPLA stipulated that land ‘capable of economic use’ would be privatised into freehold ownership, and land with ‘significant inherent values’ would be protected ‘(preferably) in full Crown ownership,’ or (presumably less preferably) by another protective instrument such as a covenant.² In 1992, the Crown pastoral estate made up one-tenth of New Zealand’s landmass. Since 1992, about one-fifth (about 80) of the original 340 leases have completed the reforms. The Crown has privatised 270,082 hectares (or 58 per cent), and shifted 196,728 hectares into public conservation land (or 42 per cent).³ Following the exchange of rights, the new freehold title-holders have paid the Crown \$18.5 million to extinguish the Crown’s interest; and the Crown has paid

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1 CPLA s 24(a).

2 CPLA s 24(b), (c).

3 See Ann Brower, ‘Whither the Crown’s Interest in South Island High Country Land Reform?’ (2007) Vol. 3, No. 4 *Policy Quarterly*.

the former pastoral right-holders \$37 million to extinguish the pastoral rights in the new conservation land. In total, the Crown has paid new title-holders \$18.5 million in 'equity of exchange' payments.⁴

As with any change in property regimes, tenure review has been contentious from the start.⁵ The question of property rights rose to the fore of the debate in early 2006, when a research report argued that the pastoral rights were less valuable than freehold rights, and therefore less valuable than right-holders and the tenure review administrators appeared to think.⁶ The right-holders' defence of the legitimacy and value of their pastoral rights culminated in successive media statements asserting that pastoral rights are very similar to freehold rights.⁷ In September 2006, the Cabinet asserted the Crown's property rights in the pastoral land by announcing that the right-holders would henceforth be charged rent amount based on a land value that includes amenity values such as lake frontage and scenic vistas.⁸

Through this debate over security and value of property rights in pastoral land, the legitimacy of the tenure review process became the subject of mounting academic and public scrutiny.

4 Ibid.

5 See, eg, *North & South* magazine described the debate as follows: 'But our smugness at how lucky we are to have such unblemished beauty has been seriously unsettled lately by a realisation these views are at risk due to a government policy that's got away from the politicians and gone over the heads of most New Zealanders. It's a process whereby 10% of New Zealand's most remote but most beautiful country, owned by the Crown, is being divided up, with much of it effectively given away to farmers, who until now have only leased this land. It's called tenure review and it's been going on for 15 years but it's only now people seem to be understanding what's really happening, how many iconic landscapes are under threat – and what's already been lost.'

M White, 'High Country Hijack.' *North & South* (Auckland), November 2006, 42.

6 See Ann Brower, 'Interest Groups, Vested Interests, and the Myth of Apolitical Administration.' Report submitted to Fulbright-New Zealand, February 2006.

7 See in late 2006, a spokesperson for the High Country Accord, an advocacy group for pastoral right-holders was quoted in *The Timaru Herald* saying 'in order to get our views across we had to commission an independent report.' 'Economists Hired to Discredit Report,' *The Timaru Herald*, (Timaru), 25 November 2006, 2. To announce the release of the commissioned independent report, the High Country Accord held a press conference at which one of the report's authors stated: 'The rights of a lessee approximate to ownership rights in the case of high country real estate, so long as the lessee continues to use it for pastoralism.' A pastoral lease was very different from renting, with lessees holding title to the land which had been transferred into private hands by the Crown. 'The fact that this was done through a perpetually renewable lease rather than through the transfer of freehold property rights does not change the fact that properties concerned are now in private hands.' (Prof. Neil Quigley quoted in 'High Country Lessees Vindicated by Report', *Otago Daily Times* (Dunedin), 27 November 2006, 10.

8 Cabinet Business Committee, *A Sustainable Future for the South Island High Country: Pastoral Leases Valuation Reviews: Report Back*, 9 October 2006, CAB Minute (06) 37/6.

Though the right-holders argued that tenure review delivers public benefits,⁹ several prominent conservation, recreation, and taxpayer interest groups began to argue that the public was losing more than it was gaining.¹⁰ Following several such statements questioning the win-loss calculus,¹¹ the Cabinet moved to improve procedural quality assurance and ensure greater ministerial oversight of tenure review.¹² This may represent a distinct paradigm shift for tenure review.¹³

Specifically the new policy will identify leasehold properties with 'highly significant lakeside, landscape, biodiversity or other values'¹⁴ for permanent exclusion. This property identification exercise, with a default assumption for lakeside properties, will excise identified pastoral leases from the free holding opportunity implicit in tenure review. Though the Crown has enjoyed veto power since 1992, June 2007 is the first exercise of that power.¹⁵

9 See in August 2006, several conservation groups called for a moratorium on tenure review. *The National Business Review* reported the interest group machinations as follows: 'Farmers and environmentalists have done a U-turn on their respective positions over high country land tenure review in light of a new report that says the review is endangering bio-diversity. ... The process had generally been supported by environmentalists in spite of concerns about some specific deals, whereas a farmer lobby group, the High Country Accord, had complained that landowners were getting a raw deal. ... But now the farmer lobby is back-peddalling at top speed', Chris Hutching, 'Farmers and Greenies Swap Positions: Researchers Call for a Halt to High Country Land Review,' *The National Business Review* (Auckland), 18 August 2006.

The Press reported the one right-holder's defense of tenure review as follows: 'Moratorium opposed: Rakaia Gorge farmer Duncan Ensor says tenure review is working as well as it can. His back-country station, Glenrock, has been in the review process for years, with an agreement likely in weeks. ... If Ensor accepts the proposal, 6000ha of the 7000ha station will be surrendered to conservation. ... Ensor said some conservation lobby groups might be getting carried away, and he did not want his review held up by a moratorium sought by the Canterbury - Aoraki Conservation Board.' John Keast, 'Halt to Tenure Review Urged' *The Press* (Christchurch), 10 August 2006.

- 10 For rising interest group scrutiny, see, eg, www.StopTenureReview.co.nz; and Eugenie Sage, 'Conservation and public being short changed by tenure review', *Otago Daily Times* (Dunedin), 28 August 2006.
- 11 See the most prominent expressions of the media attention were on TV3's Campbell Live (Richard Langston, 'The Great South Island Land Rip-Off'; *TV3 Campbell Live*, 28 February 2007 available at <<http://www.tv3.co.nz/default.aspx?tabid=112&articleID=22032>> 26 October 2007; in *The Press* Ian Steward, 'Stations to become resorts.' *The Press* (Christchurch), 19 January 2006; and the *Dominion Post*, Sarah Boyd, 'Fears That Condos Will Be New Rabbits'. *Dominion Post* (Wellington), 14 October 2006; and 'A Blot on Our Landscape', *Dominion Post* (Wellington), 20 October 2006.
- 12 Cabinet Business Committee, *South Island High Country Landscape, Biodiversity, and Access Issues*, 5 June 2007, Cabinet Business Committee Minute of Decision CBC Min (07) 10/12.
- 13 C.f. the limited terms of reference for the Parliamentary Commissioner for the Environment's (PCE) Investigation into tenure review for South Island High Country Crown pastoral leases of June 2006 which did not investigate in depth property rights. Parliamentary Commissioner for the Environment, *Investigation into South Island high country land tenure review*, (2006) available at <<http://www.pce.govt.nz/projects/2006206.shtml>> 26 October 2007.
- 14 Cabinet Business Committee ((07)10/12) above n 12, item 11.
- 15 See Land Information Minister David Parker defends the decision to veto deals in-progress and withdraw some leases before they start. As reported in *The Press*:

'He says tenure review has always been voluntary, for both the lessees and the lessors. "Their rights under their leases are not being eroded. Lessees have long said it should not be compulsory for them to have to take part in tenure review. I agree. Neither should it be (compulsory) for the Crown.'" He says it is inconsistent that some farmers insist tenure review must be voluntary for farmers, but not for the Crown. "We're talking about landscapes that are special to all New Zealanders. We think it's in the interests of all New Zealanders that we protect these properties where we're happy with the status quo. Pastoral leases protect the status quo more than freehold would."

David Williams, 'High-Country Headaches,' *The Press* (Christchurch), 26 October 2007, page 10.

Tenure review represented for pastoral leaseholders a government sanctioned opportunity to effect the transition from lesser use rights to the superior property regime of freehold title. However Cabinet's resolution of 5 June 2007 to voluntarily exit some tenure review negotiations acknowledges the pre-eminence of government as the grantor of new property rights, and its inherent power to withhold such rights.

Cabinet's attitudinal change (from confidence in tenure review delivering conservation and land management objectives to increasing scrutiny) suggests that it is timely to reflect on a number of issues of property law integral to the tenure review debate. Though commonly called pastoral lessees, the holders of pastoral rights are more properly described as the holders of an interest under Part 4 of the CPLA.

Parts II and III examines the rights of the pastoral right-holder through the prism of their constituent statutory origins. This exercise indicates that the rights of so-called 'pastoral leaseholders' correspond more accurately to those of a statutory quasi-usufruct. Whilst nomenclature of property rights may seem erudite and remote from the vigour of tenure review, it is submitted that if all parties properly understood their respective theoretical positions, then the practical imperatives of certainty, consistency and transparency would be better served.¹⁶

Part IV examines the rhetorical foundation for the right-holders' claims of legitimacy and value. It briefly compares several arguments supporting their claim – the classical economics efficiency argument, and the Lockean labour theory of property.

Lastly Part V examines the role of government as the grantor and guarantor of property rights. It is argued that the Government's policy change may represent the rekindling of a functioning and balanced property rights regime in this vital area.

Pastoral right-holders rely on three distinct but related sources of legitimacy and value for their rights – statute, common law, and rhetoric. This article examines the three sources and concludes that pastoral rights are conferred by statutory lease, not common law lease. The former is more constrained than the latter. It does not confer exclusive possession as the common law defines the term nor does it guarantee rights and remedies that are possessory-based (such as trespass). Hence much of the rhetoric surrounding pastoral property rights has a flimsy legal foundation. As such, despite the prominent narratives, the Crown may set goals and rules for tenure review based on its current land use goals,¹⁷ rather than according to rhetoric promoted by interest groups.

16 See for example the comments of Professor Neil Quigley that 'there is a comprehensive misunderstanding of the lessee's interests in the land.'

Quigley, Neil, 'Tenure review no sinecure for high country farmers,' *New Zealand Herald*, (Auckland) 24 January 2007, available at <http://www.nzherald.co.nz/topic/story.cfm?c_id=195&objectid=10420514> 23 August 2007.

17 See the Media Statement of the Hon. John Tamihere dated 18 August 2003 for the government's stated high country land use goals available at <<http://www.beehive.govt.nz/ViewDocument.aspx?DocumentID=17584>> 24 July 2007.

For other land-related goals, see Department of Conservation and Ministry for the Environment, *The New Zealand biodiversity strategy*, (2000);

Land Access Ministerial Reference Group, *Walking Access in the New Zealand Outdoors: A report by the Land Access Ministerial Reference Group*, (2007) available at <<http://www.maf.govt.nz/mafnet/rural-nz/people-and-their-issues/access/walking-access-in-nz-outdoors>> 26 October 2007;

Ministry for the Environment, *New Zealand Climate Change*, (2007) available at <<http://www.mfe.govt.nz/issues/climate>>.

II. PART 1 CPLA HOLDERS – A CONSTRAINED BUNDLE OF RIGHTS

The rights of the 304 South Island High Country Crown pastoral right-holders are prescribed generally in Part 1 and specifically in section 4 of the CPLA. The section is succinct and superficially simple.

A pastoral right-holder has:

- 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; and
- d) no right to acquire the fee simple of any of the land.

Any instrument executed pursuant to section 4 should and must adhere to the four corners of this truncated statutory construct. Any additional or ancillary gloss to such rights must be explained by reference to this tightly constrained bundle of rights in Part 1 of the Act, and the *mutatis mutandis* scope for the continued application of the Land Act 1948.¹⁸

Traditional legal theory describes property as a bundle of rights. This bundle or collection of sticks typically includes hallmark rights of unfettered alienability, rights of use, exploitation and enjoyment, and the right to exclude. The greatest real property interest known to the Anglo-common law tradition, the fee simple estate contains the biggest bundle. As the right in question varies or diminishes, the bundle of rights itself adapts. Hence from a hierarchical perspective, one would expect the fee simple estate to be at the apex of a reverse pyramid, with leasehold interests thereunder, and at the bottom of the hierarchy, lesser proprietary interests such as mere equities,¹⁹ or usufructs.

Section 4 CPLA sets out four basic rights.²⁰ The bundle here is small and constrained. Each individual ‘right’ shall now be examined in turn.

A. *Exclusive right to pasturage over the land*

This right is exclusive to the holder. It has been defined at common law as ‘a right to feed animals from vegetation growing on the land of another, [emphasis added] or a right to take grass and other herbage by the mouths of animals.’²¹

The common law then subdivides the right into three sub-categories, of which ‘several pasturage’ is the closest approximation to section 4. None of these common law distinctions are particularly pertinent, given that the local right is purely statutory, and given the irrelevance of the social and geographic conditions of feudal England to contemporary New Zealand.

The blend of statute and residual and applicable common law would suggest that this right *simpliciter* is a right to graze and feed animals from the grasslands and other herbage of the High Country. It is a right of use that the holders are not obliged to share with anyone else.

On a superficial reading, one might assume that an exclusive right to pasture also confers an exclusive right of possession, and possessory-based remedies such as trespass. As Part III concludes, such an inference would be incorrect.

¹⁸ CPLA s 23.

¹⁹ See, eg, *Latec Investments Pty Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965).

²⁰ See that these 4 rights were carried over without change from the former section 66 Land Act 1948 (now repealed).

²¹ *Earl de la Warr v Miles* (1881) 17 Ch D 535, 588–9.

B. *A Perpetual Right of Renewal for Terms of 33 years*

This right is powerful, in that it guarantees perpetuity of duration of term. It ‘rolls-over’ every 33 years,²² ostensibly to pay lip service to common law notions of certainty of term.

However in substance it is anomalous that a leasehold can theoretically endure in perpetuity (subject only to forfeiture or surrender). It is only the force of statute that guarantees its potentially unlimited life, given that leaseholds at common law demand certainty of, and limitation of duration.²³

However this right is merely temporal, it is not in itself substantive. It does not confer use rights in isolation; rather it confirms that the other use rights (or non-rights as the case may be) listed in section 4 have the potential to endure, problematically forever, for the benefit of the holder. Though the right-holder may graze the land forever and may exclude others from doing the same, this grazing right will never mature into a right to subdivide or even to exclude uses which do not interfere with the statutory right to graze.²⁴

The perpetual right of renewal is purportedly qualified by a rent review process,²⁵ however a failure to agree on the fixing of the amount of the ‘rent’ after the expiry of the first instrument’s term is far from fatal from the perspective of the right-holder.²⁶ Where the Crown seeks to impose a higher fee (representing for example scenic amenity values²⁷) the holder has significant rights to dispute the re-calculation without prejudice to his or her rights of renewal. In so appealing a rent review, the consequences of a failure to adhere to time limits are all visited on the Crown. But for the discretionary forfeiture section 135 Land Act, 1948, the ‘right to renew’ in Part 8 is in substance an ultimate right to surrender entirely vested in the Part 1 CPLA right-holder.

C. *No Right to the Soil*

Unlike the positive right to pasturage, this soil right is couched in negative terms. It is thus a non-right, or one reserved by the Crown.

There is no judicial interpretation of the term ‘right to soil’ in New Zealand land law jurisprudence. It is thus to the terminology of land law that one must turn. In traditional common law parlance, the terms ‘soil’ and ‘land’ are not interchangeable.

‘Land’ implies a three-dimensional space, including the surface soil, and a relative and discretionary area that extends to such airspace height as a land owner can reasonably use and enjoy,²⁸ and analogously into the sub-soil below. It also implies a bundle of rights (variously referred to as estates, interests, hereditaments or tenements) both corporeal and incorporeal. Hence ‘land’ is simultaneously physical and intangible. It has the scope to envisage and embrace modern intangible rights such as subdivisional or development rights.

22 See also CPLA ss 5, 10.

23 *Sevenoaks, Maidstone and Tunbridge Railway Co v London Chatham and Dover Railway Co* (1879) 11 ChD 625 at 635–636.

24 See, eg, in the US, activities such as tramping, mountain biking, and even motor-biking are deemed consistent with grazing federally-owned lands. Hence all compatible recreational uses are allowed on US federal grazing land.

25 CPLA s 63(3), 63(4) & Land Act 1948 pt 8.

26 CPLA s 10.

27 See Cabinet Business Committee, *A Sustainable Future for the South Island High Country: Pastoral Leases Valuation Reviews: Report Back*, 9 October 2006, CAB Minute (06) 37/6.

28 *Baron Bernstein of Leigh v Skyways & General Ltd* [1978] QB 479.

Conversely ‘soil’ remains resolutely physical and tangible. It has been the foundation of legal aphorisms including: ‘whoever has the soil, also owns the heavens above and to the centre beneath’ (relating to the limits of land); ‘whatever is affixed to the soil becomes part of the soil’ (relating to the doctrine of fixtures) and ‘alluvio’ (being the soil a land owner acquires by accretion). It is described in the Encyclopaedic Australian Legal Dictionary as ‘the thin veneer of comparatively unconsolidated material covering large areas of the Earth’s surface.’

To borrow another aphorism, land includes all soil, but soil does not include all land. Hence ‘no right to the soil’ means no rights to the physicality of the surface of the earth. Further, it means no rights of use or enjoyment, other than the narrow user rights to graze previously traversed. It certainly does not hint at conferring any rights incidental to the wider concept of ‘land’ such as subdivision or development.

Further, pursuant to the *eiusdem generis* rule of interpretation, this non-right should be construed together with its other negative right, the ‘no right to acquire the fee simple.’ Taken together, the two clearly preclude the right-holder from all non-pastoral uses of pastoral land without prior Crown consent.

D. No Right to Acquire the Fee Simple of any of the land

The tenure of the statutory pastoral right-holder is purportedly frozen in a property rights regime that precludes any transition to the fee simple estate of any of the land [emphasis added]. This prohibition is mirrored elsewhere in Part 1 of the CPLA.²⁹

However it is the ambiguity and internal tension between Parts 1 and 2 of the Act that underpins much of the angst of the current tenure review debate. Part 1 curtails pastoral interests forever as user rights with no entitlement to fee simple. Conversely Part 2 anticipates change, whereby ‘reviewable lease holders’ may invite the Commissioner of Crown Lands to ‘undertake a review’.³⁰ Such review is designed ostensibly to further the Objects of Part 2,³¹ namely ecological sustainability, the unshackling of management constraints (direct and indirect) from land capable of (better) economic use, the restoration of full Crown ownership of land with ‘significant inherent values’ (or at least appropriate protective mechanisms), and ultimately the freehold disposal of reviewable land.

It is the shambolic ‘all things to all people’ nature of Part 2 that renders this negative right illusory. Whilst it is strictly true that in its current incarnation, the pastoral lease (and occupation licence) remain constrained use rights, their possible migration via Part 2 to *inter alia* freehold disposal fuels the perception (and the partisan rhetoric) that perpetual pastoral rights equate to freehold.³² Moreover Lockean notions of the ‘sweat of the brow’ and related catechisms such as the law rewards the productive use of land find legislative resonance and comfort in Part 2, particularly section 24(a)(ii). This rhetoric/property rights dichotomy shall be addressed in Part IV.

29 CPLA s 12 relating to occupation licences.

30 CPLA s 27.

31 CPLA s 24.

32 When queried about the \$18 million paid to new freehold title-holders in equity of exchange payments in tenure review, advocates of pastoral right-holders argue that their rights are the moral and economic equivalent of freehold, therefore \$18 million is a bargain for the Crown. For example, *The National Business Review* reported in 2006: ‘Mr Eckhoff said the true value of the Crown pastoral leases was the exclusive use conferred on runholders in perpetuity. “It becomes tantamount to freehold title. The only difference is we pay a bit of rental on it.”’ Chris Hutching, ‘Farmers “Load Their Muskets”’ *The National Business Review* (Auckland), 20 October 2006.

III. LEASE, LICENCE OR STATUTORY USUFRUCT?

The CPLA, and indeed the generic Crown lands legislation the Land Act 1948, distinguish between the terms ‘lease’ and ‘licence’ merely by reference to the quantum of rights each respective entitlement confers, and not by any doctrinal justification(s). This purely statute-based descending hierarchy is evidenced by a comparison of the ambit of rights in sections 4 and 12 of the CPLA. For example ‘pastoral leases’ endure for renewable 33 year terms, whilst ‘occupation licences’ are for lesser-fixed terms with a lower security of tenure.

In the Land Act, the distinction between lease and licence is merely one of procedure and form.³³ Indeed the terms become virtually interchangeable in section 68 where ‘short-term tenancies’ are simultaneously ‘licences’. Another gradation in this statutory taxonomy is that of ‘permit,’ the ‘no-frills’ licence revocable on one month’s notice.³⁴ The interpretation section 2 (which describes either a ‘lease’ or ‘licence’ as meaning the respective interest granted under the Land Act 1948, or its predecessors) underscores that the distinction is entirely statutory.

This position should be contrasted with the common law’s treatment of leases. Whether an instrument is a lease or not depends on its substance, not its form. If it confers a right of exclusive possession to the tenant, guarantees quiet enjoyment, non-derogation from grant, and obliges the tenant to yield up vacant possession at the end of the term, then on balance the law will treat it as proprietary. Regard will be had to the presence or not of the usual covenants typically seen in leases, which suggest the granting of an interest in the land to the putative tenant.³⁵

The substance/form dichotomy is particularly confused in the touchstone common law right of ‘exclusive possession’³⁶ (at times inaccurately called occupation³⁷), and the concomitant covenant of ‘quiet enjoyment.’ Right-holders and their advocates frequently claim that a pastoral lease confers these rights.³⁸ Several Part 1 CPLA instruments (regulations and administrative documents) state that a pastoral lease confers “exclusive occupation and quiet enjoyment,”³⁹ though both phrases are conspicuously absent from the Land Act and the CPLA. Further, right-holders have argued that quiet enjoyment and exclusive possession are so often listed together that it is easy to

33 Land Act 1948 s 81.

34 Land Act 1948 s 68A.

35 See for example limits on the rights of assignment, and qualified rights of entry.

36 *Radaich v Smith* (1959) 101 CLR 209 at 222; *Fatac Ltd v Commissioner of Inland Revenue* [2002] 3 NZLR 648.

37 See for example M Wonnacott, *Possession of Land*, (2006) 14–18.

38 See for example, a professor of farm management opined in the *Otago Daily Times* that ‘The problem starts with a poor understanding within the community, and even by some so-called experts, as to runholders’ existing bundle of rights. The high-country leases have a perpetual right of renewal. ... The runholders also hold a legal right to the quiet enjoyment of the land. This means they can legally exclude everyone else from the land in exactly the same way as if they held freehold title. And they can do so forever. ... In many cases there is not much difference between what runholders can do with their leasehold tenure compared to converting it to freehold.’

Keith Woodford, ‘Process Becoming Messy as Rules Change.’ *Otago Daily Times* (Dunedin) 6 January 2007.

39 Commissioner of Crown Lands, *The Tenure of Crown Pastoral Land, the Issues and Options: A Discussion Paper* 38, (1994) 11.

assume they are equivalent.⁴⁰ Right-holders' claims and regulatory proclamations in this case resemble a chicken and egg conundrum in which it is difficult to know which came first.

However the form of the terms 'exclusive possession' and 'quiet enjoyment' belie their substance. At common law 'exclusive possession' is a proprietary right to exclude all, and is the defining incident of the relationship between the estate holder and their corporeal leasehold estate. When used in statutory instruments, it is inaccurate to represent that exclusive possession has the same all-embracing ambit. Rather it must be referable to the purpose of the statutory grant. In other words, the rights are circumscribed. In the case of pastoral leases, it relates to the degree of control necessary 'to prevent others from engaging in pastoral activities on the same land.'⁴¹ Analogously in the case of another creature of statute, the mining lease, 'exclusive possession [is conferred] only to the extent necessary to prevent others from carrying out mining.'⁴² Notwithstanding its 'common law connotations, the nomenclature of a "lease" (when used as a descriptor for pastoral leases) does not of itself grant exclusive possession.'⁴³

Similarly the statutory covenant of 'quiet enjoyment,' an adaptation of the common law tenant's right to freedom from interference in exercising their tenancy rights, is less fulsome. For right-holders, this particular freedom from interference must be referable to the legitimate exercise of the primary right to pasturage. That such a right is exclusive [emphasis added] entrenches the obfuscation. But it does not extend to a generic common law lessee's freedom from interference; if it did, it would step outside the four corners of the statutory remit and should properly be *ultra vires*:

Land law is but one area in which statute may appear to have adopted general law principles and institutions as elements in a new regime, in truth the legislature has done so only on particular terms.⁴⁴

Finally the common law demands of leases a certainty of term. William Blackstone explained that a lease is called a term 'because its duration' or continuance is bounded, limited, and determined; for every such estate must have a certain beginning and certain end.⁴⁵ The assertion that (for example) pastoral leases under section 63 Land Act 1948 or 'Glasgow leases' do not offend this basic rule⁴⁶ is not incontrovertible. A perpetual right of renewal in substance renders the certain end-date illusory. This is evidenced in the rhetoric of pastoral right-holders themselves who admit:

40 However frequently cited, these phrases are never followed by a citation listing the statute, section, and sub-section from which these rights arise. For example, the government-commissioned report on the pastoral rental valuation methodology stated the following, with no footnotes: 'We agree with the interpretation on all of the heads of rights set out above except for their view that the SIVs "belong" to the Crown as lessor. This may be a matter of interpretation because whilst it may be that they do belong to the Crown, the Crown has no access to them due to the lessees' right of *perpetual occupation, quiet enjoyment, exclusive use and the right of perpetual renewal* [emphasis added] of the lease.'

D J Armstrong, R L Engelbrecht, and R L Jefferies, *Interim Report High Country Pastoral Leases Review 2005: A Review of Pastoral Lease Rental and Tenure Review Valuation Methodologies and Outcomes Associated with Pastoral Lands Throughout the South Island of New Zealand*, (2005).

41 *Western Australia v Ward* [2002] HCA 28 at [589]–[590] (Kirby J); *Ward v Western Australia* (1998) 159 ALR 483 (Lee J).

42 *Ward v Western Australia* (1998) 159 ALR 483 (Lee J).

43 *Western Australia v Ward* [2002] HCA 28 [180] (Gleeson CJ, Gaudron, Gummow & Hayne JJ).

44 *Wik Peoples v State of Queensland* (1996) 141 ALR 129, 242 (Gummow J).

45 *Commentaries* 1st ed (1766) Bk II 143.

46 See, Hinde, McMorland, & Sim, *Butterworths Land Law in New Zealand* (1997) 437.

[P]astoral lessees entered into an agreement with the Crown in perpetuity [emphasis added] when they signed their lease documents, and in exchange for their rights to pasturage accepted certain restrictions and undertook a caretaker role. They strongly believe in the sanctity of lease documents...⁴⁷

Unlike the traditional dichotomy between leases for a fixed term (with a certain end date) and periodic or continuing tenancies (where the end date is capable of being made certain by notice), Part 1 CPLA holders are a hybrid of the two. Their duration is only sustainable by superior force of statute. Of course 'Parliament may ... create proprietary interests of a kind unknown at common law,'⁴⁸ and 'perpetual leases enjoy this legislative dispensation.'⁴⁹

The common law has maintained the traditional distinction between leases and licences⁵⁰ by effectively quarantining licences to the law of contract. The common law notion that a lease confers a proprietary interest (with attendant implied covenants and the protection of property law remedies⁵¹) whilst licences are merely contractual permits to occupy for stated purposes is not explicit in either the CPLA or the Land Act. These Crown land statutes have largely ignored or understated common law lease pre-requisites when creating their statutory interests, save the tag. The abiding conclusion is that the Crown Land interests created are purely statutory ones, whose ambit depends properly on tenets of statutory interpretation.

That statutory pastoral 'leases' should not have the imprimatur of their common law cousins has (as traversed) received the highest judicial support in Australia.⁵² When canvassing the ambit of a pastoral right-holder's right(s), the implied common law covenants of quiet enjoyment and exclusive possession have no determinative role. Rather the rights (being creatures of statute) should be measured by their constituent statutory instrument of grant. Australian High Court Justice Gaudron was succinct:

It is clear that pastoral leases are not creations of the common law... That they are now and have for very many years been anchored in statute law appears from the cases which have considered the legal character of holdings under legislation of the Australian states.⁵³

Pastoral leases as a statutory phenomenon have been described as:

... a limited form of property right. [where] the rights of the pastoralist are set out in various Land Acts. ... This system ... is unique to Australia and New Zealand and evolved last century to control the activities of squatters and to protect the rights of Indigenous peoples.⁵⁴

Historically statutory pastoral leases were recognised as:

giv[ing] only the exclusive right of pasturage in the runs, not the exclusive occup[ation] of the Land, as against Natives using it for the ordinary purposes: nor was it meant that the Public should be prevented from the exercise, in those Lands, of such rights as it is important for the general welfare to preserve, and

47 Evidence of High Country Pastoral Lessees to Ngai Tahu Land Report, Waitangi Tribunal, Department of Justice, Wellington (1991) [23.2.2].

48 *Sevenoaks, Maidstone and Tunbridge Railway Co v London Chatham and Dover Railway Co* (1879) 11 ChD 625 at 635–636.

49 P Butt, *Land Law* (5th ed, 2007) 887.

50 *Street v Mountford* [1985] AC 809.

51 See for example the possessory-based remedies of trespass, nuisance and ejection.

52 *Wik Peoples v State of Queensland* (1996) 141 ALR 129.

53 *Wik Peoples v State of Queensland* (1996) 141 ALR 129 at 204.

54 National Indigenous Working Group (NIWG) Fact Sheet on Pastoral Leases, available at <http://www.faira.org.au/niwg/fact_sheets/fs2.html> 13 August 2007.

which can be exercised without interference with the substantial enjoyment by the lessee of that which his lease was **really** [emphasis added] intended to convey.⁵⁵

There is no reason in principle, authority or logic to treat the rights of Part 1 CPLA holders as anything other than statutory interests. To imbue their rights as those of ‘lessees’ is to inaccurately colour the strength of such rights with the common law antecedence of leasehold.⁵⁶ To avoid confusion, nonsensical interpretation, or ‘throw[ing] well-established principles into turmoil,’⁵⁷ accuracy of nomenclature is and should be important.

In contrast to leases, the law has recognised lesser user rights (collectively ‘the usufruct’). The usufruct is a proprietary right significantly lower on the public’s radar. It is an ancient right, documented in Roman law as ‘the right to use and enjoy the things of another without impairing their substance.’⁵⁸ It was also recognised as proprietary, ‘usufruct is a fraction of ownership and stands by itself in that it can be granted so as to take effect immediately or from a future day.’⁵⁹ The usufruct had acknowledged economic and environmental values. It was a short form, often transient, bundle of right(s) that had minimal impact on the common estate, permitting authorised modes of use or exploitation provided waste was not a consequence thereof. It fell far short of full ownership of land.

The rights of Part 1 CPLA holders are a statutory bundle. They consist of a perpetual and exclusive right to pasturage (‘the primary right’) subject to two prohibitions. Ancillary rights to the primary right must be construed from residual provisions of the Land Act (for example that the interest may be transferred,⁶⁰ or mortgaged⁶¹) and activities incidental to pasturage, such as erecting fences or yards.⁶²

The bundle is a truncated short-form interest that has as its core rationale an exclusive right to pasturage. In the interests of taxonomic good order, it would be more accurate to describe the right(s) of Part 1 CPLA holders as a quasi-usufruct of statutory origin.

IV. THE RHETORIC/PROPERTY RIGHTS DICHOTOMY

It is perhaps not surprising that a statutory lease (or indeed a quasi-usufruct of statutory origin) could pass for a common law lease for so long in New Zealand’s high country. Property rights in the Anglo-New Zealand common law tradition are captive to the normative force of the rhetoric of property law, and high country right-holders use this rhetoric as a third source of legitimacy for their property claims. Holders of private rights in public lands in Australia, the US and New Zealand have been observed using this rhetorical flexibility to bolster the longevity, breadth, and value of their rights.⁶³ These rhetorical claims often resemble traditional narratives more closely

55 Earl Grey writing to NSW Governor FitzRoy in 1847 as cited in L Godden, ‘Wik, Feudalism, Capitalism and the State. A Revision of Land Law in Australia’, 1929 APLJ LEXIS 3.

56 ‘Traditional concepts of English law...may still exert ...a fascination beyond their utility in instruction for the task at hand’, *Wik Peoples v State of Queensland* (1996) 141 ALR 129, 226 (Gummow J).

57 M Wonnacott, *Possession of Land* (2006) 18.

58 Paul, *Vitellius*, book 3 cited in *The Digest of Justinian* Vol 1 Book 7.

59 Paul, *Edict*, book 2 cited in *The Digest of Justinian* Vol 1 Book 7.

60 Land Act 1948 s 89.

61 Land Act 1948 s 94.

62 See also the definition of ‘improvements’ in s 2 CPLA (carried over from the Land Act 1948).

63 See Ann Brower, John Page, Amanda Kennedy, and Paul Martin, ‘The Cowboy, the Southern Man, and the Man from Snowy River: The Symbolic Politics of Property in the Us, New Zealand, and Australia.’ (forthcoming).

than statute. As an evolving and constantly dynamic process, the refinement of existing property rights, or the creation of new rights, is susceptible to the narratives that sustain rhetoric. These narratives include historical, doctrinal and theoretical themes that individually and/or collectively have the capacity to influence the nature, content or extent of new property rights.

A. *Possession as the root of title*

Firstly, pastoral right-holders extract substantial legitimacy from the possessory origins of property law.⁶⁴ In the common law tradition, property rights in land were rooted in seisin, a feudal form of possession,⁶⁵ yielding the maxim '[p]ossession is the origin of property'.⁶⁶

Carol Rose describes possession as akin to yelling *this is mine* loudly enough to all those who may be interested in hearing. If that person says it often enough in a way the public understands as clear and unequivocal, '[he] gets the prize and the law will help him keep it.'⁶⁷

B. *The law rewards the productive use of land*

This narrative takes root in John Locke's his labour theory. If 'every Man has Property in his own Person [it follows that] [t]he labour of his Body, and the Work of his hands ... are properly his.'⁶⁸ In common law, this Lockean principle is one of the important theoretical grounds that rationalises the doctrine of adverse possession. Pastoral right-holders defend their rights, their privileged status in tenure review, and the privatisation of Crown land on Lockean grounds.⁶⁹ This Lockean narrative is further supported in the academic anthropology literature.⁷⁰

64 'The rights of a lessee approximate to ownership rights in the case of high country real estate. ... The fact that this was done through a perpetually renewable lease rather than through the transfer of freehold property rights does not change the fact that properties concerned are now in private hands.' Professor Neil Quigley, consultant to high country right-holder advocacy group High Country Accord, quoted in 'High Country Lessees Vindicated by Report.' *Otago Daily Times* (Dunedin), 27 November 2006.

65 See generally the doctrines of tenure and estates.

66 C M Rose, 'Possession as the Origin of Property' *The University of Chicago Law Review*, Vol. 52, No. 1 (1985) 73, 74.

67 C M Rose, 'Possession as the Origin of Property' *The University of Chicago Law Review*, Vol. 52, No. 1 (1985) 73, 81.

68 J Locke, *Second Treatise of Government*, ch. V s 27 cited in M J Radin, 'Property and Personhood' cited in R C Elickson, and C M Rose, and B A Ackerman (eds), *Perspectives on Property Law* (3rd ed, 2002).

69 In a press release responding to the conservationist groups' August 2006 call for a moratorium on tenure review high country advocacy group, the High Country Accord, defends holders right to retain land as freehold by arguing that 'the land that lobbyists want transferred back to the Crown has been farmed for 150 years.' Though not directly invoking Locke, this mention of labouring the land is immediately followed by the following claim of ownership: 'There is also a wilful disregard ... of the legal position of high country leases. The fact is that the land is permanently in private hands.' Finally, tenure review would be less difficult and acrimonious, argues the farming lobby, 'if everyone accepted that high country lessees were capable of good stewardship of their land, and that land they farm is theirs.'

High Country Accord, *Tenure Review Can Provide Win-Win Outcomes High Country Accord* 15 August 2006 cited available at <<http://www.highcountryaccord.co.nz/index.php?page=11>

70 Anthropologist Michele D. Dominy testified to the Waitangi Tribunal that pastoral right-holders' 'Material affinity [for the land] is expressed in the value runholders place on their sense of ownership in the land they farm and inhabit. It is also expressed in the value place on the long term security of tenure.'

Michelle D. Dominy, 'New Zealand's Waitangi Tribunal: Cultural politics of an anthropology of the high country', (1990) Vol. 6 No. 2 *Anthropology Today* 11, 13-14.

C. Privileges conferred on right-holders by narratives

Right-holders' use rights of High Country lands (in some cases back to 1856) entitle them as a class of initial users to a privileged status. This status takes four forms within the legislative regime of the CPLA, and arises from ideas from law and economics.

Firstly, the longevity of tenure coincides with (and likely arises from) the classical economics notion that assigning long-lived property rights gives the right-holder the economic incentive to develop and improve the economic productivity of the land. In 1948, the Crown created the statutory instrument of a pastoral lease in its current form with the perpetually renewable tenure. Though the use rights conferred were narrow, the longevity of tenure was likely designed to encourage pastoral development.⁷¹ Adding the classical economic logic to the Lockean, it is good public policy to award title to the person who efficiently cultivates or maintains his or her land, rather than an impliedly negligent absentee owner who has not checked their land for the period of limitation. In the pastoral context, it is similarly good public policy to unshackle appropriate reviewable land from management constraints (direct and indirect) that hold it back from its most economically efficient use. Hence the CPLA echoes both Locke and classical economics by rewarding the productive owner with 'the freehold disposal of reviewable land.'⁷²

In contrast to the perpetual renewability granted by statute, the exclusive possession privilege appears to arise from an erroneous inference that a pastoral lease is a common law lease. As substantial case law refutes the inference, this privilege has no legal basis.

Likewise, when it comes to tenure review negotiations, this inferred exclusive possession right appears to make the right-holder a monopolist. When the Crown disposes of its interest in pastoral land, it restricts itself to dealing only with the existing tenant. It neither sells land at auction nor entertains any other bids for freehold title.⁷³ Further, the right-holder may veto a deal at any time. While the Public Works Act requires the Crown to offer first purchase option to the original (impliedly indigenous) when it sells land, the current right holder is not the original owner. Hence this monopolist power appears to rest on the lease, not on other statute. That reliance appears ill-placed.

Finally, in addition to limiting the Crown to negotiate with the existing tenant, the illusory exclusive possession seems to devalue the monetary value of the Crown's interest in the land.⁷⁴

While the perpetually renewable privilege does seem to serve the goal of efficiency, as defined by classical economics, the latter three privileges have legal grounding that is shaky at best. Using

71 Indeed *The Press* reports this link between security and investment: 'Federated Farmers former high country chairman John Aspinall ... said in a crucial move in 1948, leaseholders were given the right to occupy the land in perpetuity. This was to give leaseholders the security needed to invest in good land management.'

Kamala Hayman, 'Study Says Tenure Review Flawed,' *The Press* (Christchurch), 23 February 2006. And the *Otago Daily Times* reports similarly: '[Mr Ensor said] "Pastoral leases have been incredibly good thing for the high country." The idea was to give lessees certainty of tenure, confidence to invest in improvements and to make the business sustainable in the long term. In short, he said, it was designed to look after the land.'

Neal Wallace, 'A Land Grab, or a Way to Preserve Modern Heritage? Tenure Review of South Island High-Country Leases Seems to Be Satisfying Few People,' *Otago Daily Times* (Dunedin) 2 January 2004.

72 See CPLA s 24(c)(ii).

73 See A Brower, P. Meguire, and A. Monks, (in review) 'Closing the Deal: Principals, Agents, and Sub-Agents in New Zealand Land Reform.'

74 'With no access to these SIVs in perpetuity, (that is while the land is held in a pastoral lease) they can be of no value to the Crown.' Armstrong, Engelbrecht, and Jefferies, above n 40.

public resources to honour illegitimate rights hints of a breach of public trust. While efficiency is good, so is good governance. Efficiently breaching the public trust rarely satisfies the Court.

D. Narratives of Ownership and the Law

Coase argues that the initial allocation of property rights is of little consequence to the long-term efficiency of outcomes, as long as the allocation is clear and holders are free to bargain away from it.⁷⁵ This Coasean clarity and freedom are necessary for an efficient property rights regime. We submit that vigilant attention to statutory and common law foundation of rights is equally necessary for good governance. When the government uses public resources to erroneously honour a perceived right with no statutory or legal foundation, it is improper governance (no matter how efficient). Therefore a functioning and vigilant property rights regime should be capable of demarcating the fine line beyond which such narratives should not pass. Transgressing this line of probity is a risk that the law constantly must resist. For the law to over-reach is the start of a 'slippery slope,' where rhetoric outweighs substance and new property rights risk the stain of illegitimacy.

Indeed while narratives about land and ownership are important to the fabric of the high country culture,⁷⁶ they have limited utility in property law's process of allocating rights. Statutes and common law, not narratives, confer rights. English Law Lord Millett affirms that 'property rights are determined by fixed rules and principles. They are not discretionary. They do not depend on ideas of what is "fair, just and reasonable."' Such concepts, which in reality mask decisions of legal policy, have no place in the law of property.⁷⁷

V. THE ROLE OF GOVERNMENT

The role of government in creating new property rights is amply demonstrated in tenure review, especially in light of the Cabinet Minute of June 2007. Robert Nelson ascribes the creation of new property rights as an unintended consequence of the intervention and implementation of government policy. Nelson describes a four-stage process of new property rights under the heading 'Fencing the Modern Commons.'⁷⁸ The first stage is when 'demands for use of the resource grow large enough to create a congestion problem.'⁷⁹ This leads to the need for government control of the resource. The second stage arrives when government establishes a permit system to allocate the resource to specific users. This allocation creates a class of 'initial users' who defend their privileged status quo against later adverse change. 'At some point, the[ir] dominant influence ... becomes accepted as the norm and existing users have acquired de facto private property rights.'⁸⁰ The third stage occurs when these rights acquire the fundamental quality of alienability, such that

75 See Ronald Coase, 'The Problem of Social Cost' (1960) *Journal of Law and Economics* Vol. 3, No. 1,3,5.

76 Michelle D. Dominy, 'New Zealand's Waitangi Tribunal: Cultural politics of an anthropology of the high country,' (1990) Vol. 6 No. 2, *Anthropology Today* 11, 13.

77 *Foskett v McKeown* [2000] 1 AC 102, 127 (Lord Millett).

78 Robert Nelson, 'Private Rights to Government Actions: How Modern Property Rights Evolve' (1986) *U. Ill. L. Rev* 361, 374.

79 *Ibid.*

80 *Ibid.*

‘the rights become detached and independently transferable.’⁸¹ Finally the ‘government regulatory agency formally transfers use rights to the private user and then ceases its regulatory activities.’⁸²

The freehold disposal of Crown land as freehold⁸³ epitomises Nelson’s theory. Demand for the resource that is High Country pastoral land instigated regulation through a permit system embracing pastoral leases with perpetual rights of renewal, together with lesser use rights under special term leases and occupation licences. These initial users, in particular the pastoral right-holders with rights of perpetual renewal, have defended the privileged *status quo* by arguing the duration of their title equates to *de facto* ownership.⁸⁴ The 80 new title-holders who have completed tenure review, have successfully matured their *de facto* user permit property right into a detached, alienable and fully private right. Under the Nelson model, the Crown has vacated its regulatory role, devolving authority over land use to regional resource management authorities. One Regional Council has expressed anxiety at Councils’ lack of preparedness for this devolution.⁸⁵

However the role of government is a ‘double-edged sword.’ Carol Rose states that government can do much for property⁸⁶ including the creation of ‘off the rack property entitlements,’ the termination of obsolete property rights, and the transition from one property regime to another. Property creates the macro-environment conducive to good governance but (perversely) within ‘smaller groups,’ (such as the original 340 pastoral right-holders) government has a powerful determinative role as the ‘shaper’ of property. As shaper, it can set goals for which rights are created in tenure review. Those goals can follow any guidelines – from the NZ Biodiversity Strategy,⁸⁷ to the Walking Access Panel’s recommendations,⁸⁸ or even to the latest trend in climate change mitigation.⁸⁹

Similarly, the Government is the grantor and guarantor of property rights.⁹⁰ What the government gives, it can equally take away. It need not follow rhetoric, no matter how prominent. Rather it could imbue the Lockean notion of ‘productive use’ with a more contemporary environmental ethos, such that the law should properly reward landholders who act as good custodians. Indeed, in 2006 the government stated its willingness to remit rent in exchange for contributions to “sustainable management” which exceed the good husbandry statutory requirements. Examples of such exemplary contributions include pest and weed control or improved public access,⁹¹ or limiting stock levels in furtherance of Crown conservation objectives. Indeed when Cabinet an-

81 Ibid.

82 Ibid.

83 CPLA s 24(c)(ii).

84 See Hutching, above n 34.

85 Keast, John Halt to tenure review urged, *The Press*, (Christchurch) 10 August 2006, 3.

86 Carol Rose, ‘What Government Can do for Property (And Vice Versa)’, cited in N Mercurio and W J Samuels (eds), *The Fundamental Interrelationships Between Government and Property* (1999) 209

87 Ministry for the Environment, ‘New Zealand Biodiversity Strategy,’ Wellington, NZ. Available at <<http://www.biodiversity.govt.nz/picture/doing/nzbs/index.html>> 2 November 2007.

88 See for example the Crown negotiated for access arrangements in *Hunter Valley Station Limited at Timaru v. The Attorney General* CA CA 38/05 26 May 2006. The Walking Access Panel’s report is found available at <<http://www.walkingaccess.org.nz/publications.html>> 2 November 2007.

89 See above n 17.

90 R J Goldstein, ‘Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law’, (1998) 25 *B.C. Env’tl. Aff. L. Rev.* 347

91 The Land Act requires the right-holder practice ‘good husbandry’ including weed control, but not all exotic woody plants are classified as a weed requiring such control.

nounced an increase in pastoral rents to include amenity values inherent in high country land, it intimated a willingness to negotiate lower rent for higher conservation stewardship or recreation access.⁹² Such a negotiation to serve the Crown's non-pastoral goals would be well within the Crown's purview. The Crown should enter negotiations open to a broad range of outcomes, and ever cognisant that right-holder's interest is a statutory construct, not a common law lease with its attendant privileges.

V. CONCLUSION

The right-holders interest is a constrained bundle, not a leasehold estate as understood at common law. As such, the New Zealand pastoral lease must be interpreted within the confines of its statutory remit, disregarding common law gloss of exclusive possession and the rhetoric that has influenced property rights to date. In understanding that the primary right is an exclusive right of pasturage, any attendant rights must refer to the primary right. Hence the holder may exclude competing graziers or preclude activities inconsistent with pasturage, but may not infer that such exclusive pastoral rights are the economic equivalent to freehold title.

The tenure review journey is far from over. In what started as a perceived 'win-win' for efficient land management for pastoral right-holders, and broad conservation objectives, the tenor has subtly but significantly changed since 5 June 2007. How it plays out remains to be seen.

It is submitted that the journey ahead would be better served by some taxonomic coherence in defining the rights of Part 1 CPLA holders, and an awareness of the legal rhetoric that has the scope to muddy rather than clarify the debate. The fundamental expectation that a property rights regime delivers outcomes that are certain, consistent and transparent depends inherently on such an analysis.

92 See question number 9 'What options will be available to lessees who can't afford the rents?' in Minister of Land Information (2006) 'Media Questions and Answers – Review of valuation methods for pastoral lands.' Wellington, NZ, available at <www.lin.govt.nz/core/crownproperty/highcountry/valuationreview/mediaqa/index.html#9> 26 October 2007.