# Property Law in the South Island High Country – Part II

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## I. Introduction

In *Property Law in the South Island High Country – Statutory Not Common Law Leases*, we contended that Crown pastoral leases confer exclusive rights of pasturage, but no rights to exclusive possession. This challenged an entrenched orthodoxy in the high country that run-holders enjoy powerful property rights analogous to freehold title, including rights of exclusive occupation.[1] Our argument is premised on the analysis that pastoral leases are a unique statutory tenure, not a common law lease. Thus the ambit of the tenure must be read within the four corners of the statutory remit, not by implication of the common law. The absence of any explicit grant of exclusive possession in either the Land Act 1948 or the Crown Pastoral Land Act 1998 (CPLA) suggests there is no grant. In this case, absence of evidence is indeed evidence of absence. At best, any right to exclusive possession can only be inferred by staring hard at the space between the lines of statute.

In December 2007, we predicted that the pastoral tenure journey was far from over. This paper continues that temporal journey by analysing the legal and political reactions to, and since, the publication of our paper. In part II we analyse the advice of the Crown Law Office which rejects our conclusions, not by the resolute clarity expected of settled doctrine, but by the long bow of inference. The implications for recreational access to Crown pastoral lands are canvassed in part III in light of imminent High Court litigation challenging exclusive occupation. Part IV traces the political twists and turns in the high country in the past year. In part V we look to the background of the Land Act 1948 and conclude that history is equally equivocal in substantiating exclusive occupation rights.

Notwithstanding the journey further travelled, our original findings remain unchanged. Rather, as part IV details, reactions to and legal developments from Page and Brower 2007 have only affirmed our original thesis that the myth of exclusive possession in the South Island high country

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1 In this article we succumb to the practice of using the terms 'exclusive possession' and 'exclusive occupation' interchangeably. For a more technical explanation of the difference between the two, see John Page & Ann Brower, 'Views, property rights and New Zealand land reform' (2008) 2(4) *International Journal Business and Globalisation* 468, 484.

rests not on the firm ground of black letter law, but on rhetoric inspired by 17th century English philosopher John Locke and the ideal of efficiency envisaged by Adam Smith. The nature and extent of pastoral tenure is far from certain. Assertions of exclusivity of possession continue to be conflated by self-serving rhetoric detached from historical and legal foundation. Ultimately, clarity will be attained only through judicial determination and definition.

## II. The Crown Law Opinion

On 14 March 2008, Crown Counsel issued an advice to Land Information New Zealand (LINZ) in response to the question, do pastoral leases confer rights of exclusive occupation. The advice was sought by LINZ as a direct consequence of the publication of *Property Law in the South Island High Country – Statutory Not Common Law Le*ases. In mid-June 2008, LINZ posted the Crown Law opinion on the Internet[2] some time after it pre-released it to high country run-holders.[3]

Crown counsel found Page and Brower's thesis unconvincing, and concluded that pastoral leases do confer exclusive possession, noting that 'it would be impossible for the holder to undertake…farming operations without exclusive possession of the land'. In reaching this conclusion, several aspects of the advice stand out.

Firstly the Crown Law Office advice failed to identify the precise legislative source of the exclusive possession grant. Instead of the definitive authority that run-holder advocates had consistently foreshadowed,[4] the advice fell back on an amalgam of 'lease' covenants and statutory inference cumulatively suggestive of intended exclusive possession. The advice identified some clauses that supported exclusivity,[5] others cited were equally supportive of a pasturage use right,[6] most were equivocal.[7] A significant number of the clauses relied upon were introduced into the

2 Letter from Malcolm Parker, Crown Counsel, to Simon Espie, Land Information New Zealand, 14 March 2008 (the 'Crown Law Opinion'), <http://www.linz.govt.nz/docs/crownproperty/crown-law-opinion.pdf> 11 September 2008.

3 For possible insight into the pre-release to run-holders, see: Neal Wallace, 'Linz Working to Rebuild Relationships with Pastoral Lessees', *Otago Daily Times* (Dunedin), 13 June 2008.

4 See Ann Brower, Who owns the high country? (2008), chapter 5.

5 For example *Land Act* 1948, Section 68A(3).

6 For example covenants 4, 8 & 10 in the Crown Law Opinion's '1st' item numbered 11, and the '2nd' item 11. Covenants requiring diligent farming or the maintenance of Crown improvements are consistent with a pasturage use right, or conforming to Crown soil conservation policy in the high country. The restrictions on use in the '2nd' item 11 are explicable on the basis that the Crown had an overriding policy objective to minimise land degradation in the high country. That a run-holder must seek consent before carrying out such non-grazing agricultural activities is suggestive of the grant of a limited pasturage use right, rather than a common law lease.

7 For example covenants 2 & 3 in the '1st' item 11 Crown Law Opinion are equivocal. Covenant 3 affirms use rights but suggests that there is an interest (that may include a use right) capable of transfer. Covenant 2 requires residence. High country history suggests that residence requirements furthered government policy of established settlement, as a counter to unfettered land speculation. In other words, such a clause may be explicable on historical grounds unrelated to exclusive possession.

principal Land Act by amendment, including as recently as 1998.[8] That a fundamental premise such as exclusive possession requires circumstantial validation from amending legislation 50 years later speaks loudly of its inherent uncertainty. Indeed the only sections from the original Act cited in support of exclusive possession were section 26 and a repealed version of section 62. Section 26 is capable of multiple interpretations, including one that is the antithesis of exclusivity,[9] whilst former section 62 highlighted the special nature[10] of the statutory tenure applicable to 'pastoral land'.

In relation to the Crown Pastoral Land Act 1998 the opinion did not enumerate corroborative provisions, preferring a blanket statement that the Act 'has a number of provisions[11] … consistent with the grant of exclusive possession although some require the consent of the Commissioner'.[12] Suffice it to say that the legislative patchwork presented in the Crown Law Opinion failed to deliver a statutory 'silver bullet' that definitively refutes our argument that the run-holders' claim of exclusive possession is shaky at best. The reliance on inference of Crown counsel re-affirms rather than diminishes the uncertainty of exclusive possession in the high country.

Secondly the stated assumption that farming operations require exclusive possession is questionable. Many primary production activities are carried out on public or private lands pursuant to licences, concessions, permits, or analogous instruments that do not stipulate exclusive possession.[13] Historically the common law utilised non-possessory proprietary interests[14] to permit agricultural use rights on the lands of another. That 'farming operations' require exclusive possession, an important plank of Crown Counsel's argument, is a notion supported by neither history nor practice. Indeed the wider concept of 'farming' articulated in the Crown Law advice is inaccurate, as the statutory use rights at question here are pastoral, and all wider non-pastoral farming or exploitation requires consent of the Commissioner of Crown Lands.[15]

Importantly the conflation of exclusive pasturage rights into a practical 'exclusive possession' appears a 'back door' means to achieve the latter. It is also a tacit concession that there is no 'front door' route. Thus Crown Counsel argues exclusive pasturage rights infer that 'other people are

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8 *Land Act* 1948, Sections 66A, 67A & 68A. Crown Counsel's interpretation of these amendments is open to alternative construction. Section 66A may suggest that use right (such as pasturage and recreation) can co-exist contemporaneously in Crown land as separate 'bundles of rights' or 'sticks'. If the run-holder had exclusive possession, there would be no scope for feasible co-existence in the manner envisaged by the 'bundle of sticks' metaphor. In considering section 67A, a Parliamentary Select Committee received advice from Parliamentary Counsel's Office: '[I]t is perfectly possible to give lessees rights that amount to something less than exclusive occupation, while still leaving lessees with some rights against trespassers.' Letter from PCO to The Chairman Primary Production Select Committee, 15 April 1997. The lessee may thus have a variant of statutory 'trespass rights' but no exclusive possession. Section 68A(3) may relate to grazing permits in their own right (as a new form of statutory tenure).

9 See further discussion on section 26 in part III.

10 In the case of 'pastoral land' neither freehold nor leasehold tenures are available, unlike 'land other than pastoral land' where either tenure is available.

11 Assuming the advice refers to sections 15 or 16 of *Crown Pastoral Lands Act* 1998, it could be argued with equal force that these provisions are consistent with long standing policy retaining Crown control in the high country to further soil conservation objectives.

12 Crown Law Opinion, above n 2, 3, clause 18.

13 Examples include some pastoral runs in Australia, cattle ranches in the Western US, and most farming operations in the UK and much of Scandinavia.

14 Such as *profits a prendre* or communal pasturage rights.

15 *Crown Pastoral Lands Act* 1998 Section 4(b) (formerly section 66(2) *Land Act* 1948) coupled with consent provisions in *Crown Pastoral Lands Act* including ss 15, 16.

excluded for other purposes'.[16] This adds an unnecessary gloss to the Section 4 CPLA grant of exclusive pasturage rights, which has 'restricted characteristics' and a 'confined scope'.[17] Pasturage is the right to graze animals on the vegetative cover of land owned by another.[18] The exclusivity of this grant means that competing grazing activities are precluded on the same land. It does not logically follow however that other people are automatically excluded where their activity does not impede the right of pasturage. The word 'exclusive' is an adjective that describes the extent of the run-holder's pasturage rights; it is not a noun in its own right. The 'farming equals exclusivity' analysis also relies for its intellectual force on the fact that run-holders own their improvements. Though this point is incontrovertible at law,[19] it submits this investment requires the security of exclusive possession. There is an historic irony in this argument, given that run-holders in the first half of the 20th century sought security for improvements through fixity of tenure and Crown reimbursement, not exclusive possession.[20] Undoubtedly pastoral improvements are a necessary incident of pasturage rights. But an 'interference' with a fence is an unauthorised interference with the run-holder's pasturage rights, because it adversely affects grazing operations. It need not be an interference with any notional exclusive possession.

Thirdly the advice criticises *Property Law in the South Island High Country – Statutory Not Common Law Leases* as being overly reliant on Australian authority, and lacking New Zealand relevance. In a contextual respect this is conceded. It is not surprising that Crown pastoral tenure has been rigorously scrutinised in Australian courts, chiefly because of native title. In New Zealand it is equally unsurprising that the tenure has not been as rigorously scrutinised given the small numbers of run-holders and the absence of any compelling thematic rationale for its close examination, at least until now. Crown counsel also suggests that different geographical conditions may explain different interpretations of antipodean pastoral tenures. However to the extent that a common denominator exists (non-intensive grazing activities over broad acre parcels), there may be greater degrees of similarity than points of difference. In any event the Australian High Court decisions[21] represent highly persuasive authority to a New Zealand court.

In answer to the allegation of New Zealand relevance, we submit three additional cases for consideration. The first is *Commissioner of Crown Lands v Bennie*[22] in 1909. The Court of Appeal was required to consider the extent of the grant of a lease in perpetuity (999 years). In so doing it used exclusive pasturage rights in both small grazing runs and pasturage leases as points of comparison. In a unanimous judgment, the court observed:[23]

> Section 176 (lease of small grazing runs) provides that such a lease entitles the lessee to the exclusive right of pasturage over all the lands included in the lease, section 198 (relating to pasturage leases) provides that such a lease entitles the holder to the exclusive right of pasturage over the lands specified therein but shall give no right to the soil, timber or minerals. In each of these cases the lease of the surface of the land gives strictly limited rights to the surface, and in the case of a pasturage lease gives a right to

16 Crown Law Opinion, above n 2, 4, clause 19.

17 *The Attorney-General for and on behalf of the Minister of Lands v Feary* CP 89/97 (12 November 1997).

18 *Commissioner of Crown Lands v Bennie* (1909) 28 NZLR 955.

19 See definition of 'Improvement' in section 2 *Crown Pastoral Lands Act* 1998. See footnote 49.

20 See generally part V of this paper.

21 The Crown Law advice relied solely on *Western Australia v Ward* [2002] HCA 28 It overlooked the earlier landmark decision of *The Wik Peoples v State of Queensland* (1996) 187 CLR 1.

22 *Commissioner of Crown Lands v Bennie* (1909) 28 NZLR 955.

23 Ibid 960 (Williams ACJ, Denniston and Edwards JJ).

> the vesture only. In the case however of a lease under Part III [a lease in perpetuity] there is no limitation of the right of the lessee to use the land as he pleases.

Though the Land Act 1948 superseded the aforementioned Act, it did not substantively change the basic rights mentioned by the Court in 1909. It merely changed the length of tenure of the rights, not the rights themselves.

The second and third cases involve the Feary family. In *The Attorney-General for and on behalf of the Minister of Lands v Feary*[24] the court held that a run-holder must apply for consent to make a track across pastoral lease land. Its rationale was that the disturbance of soil inherent in this activity was 'incompatible with the statutory concept of a pastoral lease'.[25]

This further affirms the pastoral lease is for grazing, not farming, as Crown counsel implied. In talking of (then) section 66(2) the court observed:

> Reference to the right of *pasturage* over the land indicates that the primary right conferred by the lease is a right to depasture livestock on the land. This concept is emphasised by the indication that the rights conferred do not include a right to the soil. Mr Moran argued that this reference to the soil was intended to spell out that a lessee could not use the soil for commercial purposes…In my view the restrictive interpretation is not supported by the wording of the section. If that had been the statutory intention the section would have specified that there was no right to *remove* soil. The statutory reference to soil is wider and is intended to emphasise the restricted characteristics of a pastoral lease…. Paragraph a) of the lease broadly matches section 66(2)….the result [is] that the confined scope of the pastoral lease is reinforced.

In 2001 in *Feary v Commissioner of Crown Lands*[26] the court observed that where a pastoral lessee sought equitable relief from forfeiture, a court acting in a statutory regime (under the Land Act 1948) in principle did not have the wide discretion that it would have otherwise enjoyed in an analogous equitable claim.

Collectively these cases suggest that pastoral leases are statutory interests with restricted characteristics and confined scope. Pasturage is the primary and sole right. The inherent message of the New Zealand cases is hence similar to that from the highest Australian authorities.

The final feature of the Crown Law opinion is its most quixotic. In its concluding paragraphs, the advice concedes that pastoral leases do indeed have a statutory basis, but this merely ensures uniformity of content and equality of terms. The implication is that statute only provides a framework for conformity and equity; it does not lay the legal foundation for exclusive possession. This critical role is left to the common law. The 'lease itself brings into play any common law or equitable principles and that includes the provision that it grants exclusive possession'.[27] Hence despite the prior painstaking identification of legislative clauses implying – but never explicitly stating – a grant of exclusive occupation, in the final analysis, the Crown ultimately relies on the common law which does not apply to a statutory pastoral lease.

We have no disagreement with Crown counsel as to the common law of leases.[28] But we do depart on one fundamental issue: that pastoral tenure is a creature of statute detached from the com-

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24 *The Attorney-General for and on behalf of the Minister of Lands v Feary* CP 89/97 (12 November 1997).

25 Ibid, 6.

26 *Feary v Commissioner of Crown Lands* [2001] 1 NZLR 704.

27 Crown Law Opinion above n 2, 5, clause 27.

28 *Fatac Ltd (in liq.) v Commissioner of Inland Revenue* [2003] 3 NZLR 648.

mon law, legislatively moulded to suit exigencies.[29] The Crown Law advice was framed within a common law prism in its quest for intention. In this regard it omitted to substantively address the fundamental issue of divergence. It admitted the statutory nature of pastoral leases up to a point, yet retained a 'romantically impracticable' view of the common law's role. The common law did not and does not operate in an inflexible, irrational void. It implied lease terms for pragmatic reasons, historically related to original grants presumed lost from 'time immemorial'. In a modern tenure system where the original grant is readily accessible, and its legislative source is only ten years old,[30] the rationale for the common law to play a determinative role is reduced. The rationale for a statutory regime to supplant it is commensurately enhanced.

## III. The implications for access and the declaratory judgment

The status of access rights over Crown pastoral lands to reach conservation areas, lakes, or streams, is increasingly contested ground between recreationalists and pastoralists.[31] The former cite customary open access as a traditional New Zealand value,[32] the latter rely on 'trespass rights', offset by a professed yet discretionary willingness to permit access. The notion that run-holders may not have exclusive possession of their runs injects a volatile new dynamic into this debate.

Should one accept the thesis that pastoral tenure is but a statutory use right to graze animals on the public lands of the Crown,[33] it is a logical corollary that activities that do not interfere with the run-holder's quiet enjoyment[34] of exclusive pasturage, nor derogate from the grant, should not in principle be excluded. Hence a recreational tramper who closes gates, does not graze on the high country 'vesture'[35] and does not interfere with improvements or stock, should be allowed to exercise his or her co-existing, non-exclusive public entitlement to access public resources.[36] Where there is potential conflict between uses, voluntary or mandatory codes of conduct[37] are viable points of resolution.

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29 This interpretation is not a recent invention of the Australian High Court. In the mid 19th century Counsel's opinion in colonial Victoria was sought as to the nature of pastoral tenure: 'With regard to the right to these lands, the point is not so difficult. It depends solely on the Statute and Order in Council, and though we cannot look at history or official despatches for their interpretation (and if we could Lord Grey has put it beyond a doubt in his despatch of 29 November 1846), yet the state of the law at the time the Statute and the Orders came into force, may be regarded as an exponent of their provisions.' T H Fellows, Opinions of Counsel as to the Rights of the Pastoral Tenants of the Crown (1856), 25.

30 *Crown Pastoral Land Act* 1998; see also generally A R Buck, The Making of Australian Property Law (2006).

31 Mike White, 'High Country Hijack', *North & South* (Auckland), November 2006; see also Matt Philp, 'The No-Go Zones', *North & South,* (Auckland) August 2008, 40.

32 In a government-commissioned report on public access to roads and waterways, the former Registrar General of Lands wrote: 'The intention of the Crown and the Colonial Office was to provide a new open country where the outdoors should be the preserve of the people rather than the privilege of the land owners.' Brian Hayes, Roads, water margins and riverbeds: the law of public access (2008) 1.

33 Run-holders selectively accept this thesis when it comes to justifying low valuations and concessional rents based on pasturage rights only, and no right to the soil. A case against the Crown is set down for hearing before the Land Valuation Tribunal, (due to commence13 October 2008) where restrictive pasturage rights are expected to be central to run-holder arguments.

34 *Property Law Act* (2007), S 218 (1).

35 A term used in *Commissioner of Crown Lands v Bennie* (1909) 28 NZLR 955, 960.

36 The notion of 'public resources' is legislatively recognised, see s 23 *Wildlife Act* 1953, s 26ZN *Conservation Act* 1987, clause 3 *Walking Access Act* 2008.

37 A voluntary code of conduct is proposed by part 2, subpart 2 *Walking Access Act* 2008.

But the incursion of private rights into public property complicates the relative logic of the preceding proposition. Public land subject to a strong private right may become sufficiently 'private' that its underlying status becomes moot. In the case of the Crown pastoral estate, the legislature has sought to alchemise public land into 'private' land for isolated purposes. This 'reverse deeming' is demonstrated by the Trespass Act 1980.[38] This legislation transforms public lands into private land to capture statutory trespass, a remedy shorn of its common law requirement of exclusive possession.[39] Statutory trespass purports to criminalise a recreationist's accessing of public land solely on the basis that what is at law public land owned by the Crown, is for the purposes of the Trespass Act*,* private land. The intended effect of the Trespass Act is ironic given that the CPLA expressly stipulates that, prior to a land tenure review negotiated agreement, run-holders have no right to freehold any part of the land.[40] When it comes to asserting 'trespass rights' (a misnomer[41]), there is a right to freehold.

This perverse and unsatisfactory incursion of private rights into the public domain exemplifies the difficulties that arise when a property rights regime fails to clarify the specifics of a right-holder's title, and makes the boundary between public and private land ambulatory.[42] The inefficiencies that arise from confusion over property right were first theorised by the renowned economist Ronald Coase.[43] Hence run-holder advocates make the seemingly irreconcilable argument that

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38 'NZ has among the harshest trespass laws in the world. …The FMC's view is that the *Trespass Act* 1980 tilts the balance too far in favour of the land owner at the expense of the recreational user' Janet Girvan, 'Access to Private Land and the Trespass Act' (Paper presented at the Federated Mountain Clubs Backcountry Recreation 2000 Conference, St Arnaud, 27-29 September 1991), 80. See also the parliamentary debates surrounding the passage of the Trespass Bill in 1980:

'If those station owners can prevent New Zealanders from getting access to Crown land, in effect they will be the owners of the land. They will be able to say to wealthy Americans, "Sure you can come and shoot on my property, and I will give you the right of access to go and shoot on a whole mountain owned by New Zealanders"; and they will be able to charge thousands of dollars for that privilege….By this legislation New Zealanders will be wrongly prevented from going on to Crown property, which in effect they own.' New Zealand Parliamentary Debates, 5 June 1980, 514 (Mr. Geoffrey Palmer, MP Christchurch Central).

39 Common law trespass is concerned with 'conflicts with the right of a landowner to the exclusive use of property', see Rowan-Robinson & Ross, 'The freedom to roam and implied permission' (1998) 2 *Edinburgh Law Review* 226.

40 *Crown Pastoral Lands Act* 1998, S 4(d).

41 It is a misnomer because at common law trespass is a remedy, not a right. It is a remedy concerned with unauthorised interferences to one's possession of land.

42 Regrettably the trend continues, see clause 4 *Walking Access Act* 2008 which defines 'public land' as land that is not private land, and where 'private land' includes 'any land that is held under a lease or licence granted to the person by the Crown'.

43 Ronald Coase, 'The Problem of Social Cost' (1960) *Journal of Law and Economics* 1, 3, 5.

Crown land is not public land.[44] Accordingly there is no right to access 'private land'.[45] However, away from the 'white noise' of so-called trespass rights, Crown pastoral leasehold is undeniably public land. The doctrine of tenure confirms the Crown as the ultimate legal owner of the land.[46] In 1948 the Crown introduced limited pasturage use rights that did not impair its ability to control activities adverse to the national interest of soil conservation.[47] The Crown retained overriding control of these lands for the public benefit and against the general freeholding tenor of the Act. It remains the allodial landowner not in any private capacity (for example as a corporatised Crown entity), but in a public capacity.

Thus if run-holders do not have exclusive possession, and if the Crown pastoral estate is 'public' land, why should the public be excluded? Do overriding policy objectives preclude public access rights? The historic policy preoccupations in the high country have been soil conservation and measures to avoid land degradation. It is difficult to envisage circumstances where recreational trampers, anglers or foot hunters 'disturb the soil' in ways that interfere with these policy goals. Contrast such passive uses with intrusive recreational activities like off-road 4WD use, where policy objectives are more likely to be compromised. It would appear a sliding scale in which the greater the intensity of access use, the more likely it is to be objectionable. Intensity of use also has access implications when considering the issue of run-holder owned 'improvements'.[48] As previously traversed, interferences with improvements would constitute an interference with the quiet enjoyment of pasturage rights. Thus the greater the 'access footprint', the more likely will be the impact on improvements. Correspondingly the wider the definition of 'improvements,' the

44 For example, in November 2006, the High Country Accord (an advocacy group for run-holders) hosted a media field day for which it flew journalists from all over the country to the high country (see: Staff, 'Red Rag to a Brower', *National Business Review* (Auckland), 1 December 2006). At the media conference, a professor of economics commissioned by a by the High Country Accord opined that Crown land is indeed private land:

> 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.

Prof. Neil Quigley quoted in 'High Country Lessees Vindicated by Report,' *Otago Daily Times* (Dunedin) November 27, 2006.

For other examples of run-holders equating leasehold with freehold, see: Fencepost, 'High Country Accord Defends Position,' September 22, 2006. Leanne Scott, 'Station Farmers Worried,' *The Press* (Christchurch), June 2, 2004. David Bruce, 'Farmer Threatens Legal Action on Road,' *Otago Daily Times* (Dunedin), March 9, 2005. 'this land is in private hands'.

45 The US Supreme Court described the right to exclude as 'one of the most essential sticks in the bundle of rights' of private property, *Kaiser Aetna v United States* 444 U.S. 164, 176 (1979).

46 See for example David Grinlinton, 'Private Property Rights versus Public Access: the Foreshore and Seabed Debate' (2003) 7 *NZ Journal of Environmental Law* 313, 321.

47 See the first reading speech of Lands Minister Hon C F Skinner who said 'If there is any doubt as to the suitability of the land for permanent alienation, obviously the Crown must retain some control over it. That is why there is no right of purchase in these hill country leases called pastoral licences'. New Zealand Parliamentary Debates, 24 November 1948, vol. 284, 3999, (Hon. C F Skinner, Minister of Lands).

48 Improvements were originally defined in the *Land Act* 1948 section 2 as 'substantial improvements of a permanent character, and includes reclamation from swamps; clearing of bush, gorse, broom, sweetbrier, or scrub; cultivation; planting with trees or live hedges; the laying-out and cultivating of gardens; fencing (including rabbit proof fencing); draining; roading; bridging; sinking wells or bores; or constructing water tanks, water supplies; water-races; irrigation works; head-races; bore dykes, or sheep dips; making embankments or protective works of any kind; in any way improving the character or fertility of the soil; the erection of any building; and the installation of any telephone or of any electric-light or electric-power plant'.

more likely that access is precluded. A definition of the term 'improvements' should not be so elastic that it would stretch reasonable and objective interpretations of what is 'substantial or lasting' beyond all credulity.

Lastly is there a legislative negation of a public right to access? Section 26 of the Land Act gives to the Crown unrestricted rights of ingress and egress. This could read as an implied preclusion of non-Crown ingress and egress, or it could read as an affirmation of a fully-fledged public right to access. The interpretation of section 26 raises important questions. Can an implication be drawn that because the Crown has unlimited access, somebody else does not? Who or what is the entity apart from the Crown denied ingress or egress? Having deliberately reserved to itself unrestricted access rights to the lands (the subject of the grazing use right), has the Crown retained an unfettered discretion to decide to whom and upon what terms access is granted to its public lands?[49]

It is open for members of the public (or representative groups) to make a persuasive case that a non-exclusive right to access Crown pastoral lands should be recognised. This is particularly so where no adverse public policy implications are evident, and pasturage can feasibly co-exist with access in a mosaic of *less than fee simple* use rights.[50] Moreover this approach does less damage to the private/public divide in property law, than purporting to criminalise a person's otherwise legitimate public right to access public lands. The Minister of Land Information, Hon. David Parker, deemed it unlikely that anyone would raise the exclusive possession thesis in court 'because both the Crown and the lessees agree that they've got exclusive possession'.[51] However, such a case is to come before the High Court in the first half of 2009, when the Fish and Game Councils of New Zealand seek a declaratory judgment that pastoral leases do not confer exclusive possession or exclusive occupation. Fish and Game's statutory mandate is to advocate the interests of recreational fishers and hunters, and to preserve public property rights in resources such as freshwater fish and game birds.[52] In seeking this declaratory judgment, Fish and Game is pursuing the interests of its constituents,[53] and asserting a public right that does not preclude the existence or functioning of the vested private right. The potential implications this declaratory action[54] may have on access to public resources are profound, and present an opportunity to re-establish a measure of balance to the public/private divide in the Crown pastoral estate.

49 The reservation of 'free rights of ingress, egress and regress at all reasonable times' in section 26 *Land Act* 1948 should be contrasted with section 400 *Land Act* 1994 (Qld) where Crown access requires prior agreement of the runholder, or failing agreement 14 days notice. The High Court of Australia in *Wik* found that Queensland runholders do not necessarily have exclusive possession notwithstanding the conditional access rights of the Queensland Crown.

50 See generally Sally K Fairfax et al, Buying Nature The Limits of land Acquisition as a Conservation Strategy, 1780-2004 (2005).

51 Chris Laidlaw, Interview with Hon David Parker, Donald Aubrey, Ann Brower and Kevin Hackwell, Radio New Zealand. 'Sunday Morning with Chris Laidlaw.' 7 July 2008, 10-11 am.

52 *Wildlife Act* 1953, S 23; *Conservation Act* 1987, s 26 ZN.

53 Fish and Game represents recreational anglers and game bird hunters. The New Zealand Deerstalkers Association represents hunters of game species, such as deer and tahr, larger than fowl.

54 The sole respondent to the action will be the Crown. Though the High Country Accord was invited to join, they declined, Fish & Game Councils of NZ, 'Fish and Game Application to the High Court on High Country Land' (Press Release, 19 September 2008).

## IV. Legal vs. Rhetorical Foundations of Exclusive Possession

In Page and Brower 2007, we posited that exclusive possession was a myth based, not in statute, but in rhetoric grounded in the Lockean 'work-to-own' view of land ownership and classical economic views of efficiency. Both the Crown Law opinion and farmers' responses in the media support this two-pronged thesis.

First, much of the Crown Law opinion and the farmers' rhetoric rest on the farmers' ownership of land improvements. The Crown argues that 'it would be impossible for the holder to undertake the farming operations without the exclusive possession of the land'.[55] In other words, Crown Law argues that because the economically viable pastoralism permitted by the Land Act requires improvements to the land and soil, and exclusive possession is a necessary pre-condition to improving land and soil, the Land Act drafters must have intended to grant the run-holders exclusive possession, even if they failed to do so explicitly. Further, 'bearing in mind that the lessee owns both structural improvements such as buildings and fences and improvements to the state of the land, exclusive possession ensures that the lessee will have their sole use. That is confirmed by the terms to the lease which grants the lessee the exclusive right to the pasturage. The reference to the "pasturage" is a restriction on the use to which the land can be put. But because the land is a pastoral lease granted for pasturage purposes, the use of land for other purposes (by other people) is excluded'.[56]

In his *Second Treatise of Government,* John Locke argued that because a man owns his labour, mixing individually owned labour with apparently un-owned land transferred ownership from the commons to the individual. This transfer of ownership is good for both the individual and the collective whole, because improving land adds value (by ten-fold in Locke's estimation). Some value owned by an individual is better than no value owned by the collective. Thus the Lockean 'rent-to-own'[57] view of land ownership is both legally equitable and economically efficient. The Lockean labour theory of property was very much *au courant* during the 19th century, when fledgling nations and colonies such as New Zealand, Australia, and the US were busily encouraging its citizens and subjects to settle the hinterlands and when pastoral leases were first established in New Zealand. Rewarding work on the frontier with land on the frontier seemed an equitable and efficient means of achieving Manifest Destiny.

The labour theory of property was very much a nation-building idea that promoted land settlement in a time when unoccupied land was very much a liability as it represented a hole, or a weak point in the new colony or nation.[58] As such, unoccupied land carried a negative value to the Crown or federal government, so giving it away to those who would strengthen the nation geographically and economically made sense. In that sense, the Lockean view of ownership intersects with the classical economic view of efficient use of resources. In order to promote investment in land or resource development, one must guarantee security of tenure over the resource. Without that security, the tenant will have little incentive to invest in the necessary agricultural and nation-building improvements.

55 Crown Law Opinion, above n 2, 1.

56 Crown Law Opinion, above n 2, 3-4.

57 Brower above n 4, 74.

58 See generally, Daniel Bromley, 'Private Property and the Public Interest: Land in the American Idea.' in William G Robbins and James C Foster (eds), *Land in the American West: Private Claims and the Common Good* (2000).

Whether knowingly or not, runholders have used the synergy between Locke and classical economic efficiency to blur the boundary between a legal grant of security of tenure and a legal grant of exclusive possession. Effectively they have implied that since land improvements are good for the nation and secure and exclusive tenancy is a necessary for improvement, secure and exclusive tenancy are good for the nation as well.[59] This is similar to their consistent and repeated conflation of leasehold occupation with privately owned land under freehold title.[60] The runholders summarized this argument in a media release chastising conservation groups for calling for a moratorium on the high country tenure review. Tenure review and relations in the high country would be much smoother and friendlier, they argued, if 'everyone recognized that … the land [runholders'] farm is theirs'.[61]

Again, even if the drafters failed to grant exclusive possession at black letter law, absence of evidence is not, they argue, evidence of absence. In a live debate on National Radio's Sunday Morning with Chris Laidlaw an advocate for runholders makes this case effectively:

> Aubrey: 'These pastoral leases have been provided on an exclusive basis. Without that security of tenure, I don't believe that we would have achieved the sorts of outcomes that we have for the South Island tussock grasslands. … security of tenure does deliver good results'.

But the Minister of Land Information, Hon David Parker distinguished between exclusivity and security:

> Parker: 'There are two issues here that have been conflated. One is whether pastoral lessees have long-term rights of renewal, which pastoral lessees do and absolutely need. … in respect of whether the leases confer exclusive possession, that's a separate issue. And actually I agree with Mr Aubrey on that one too. The advice to me from Crown Law is that they do confer exclusive possession'.

Several notable statutes governing the disposition, retention, and management of publicly-owned natural resources contained a method of disposition reminiscent of both Locke and classical economics. These statutes conferred exclusive possession and indeed freehold title to the men and women who had made productive use of frontier land – whether by 'proving up' on a mining claim[62] or satisfactorily staking a homestead claim.[63] But, with notable exceptions, the days of public land and resource disposition by Lockean logic came to a close soon after the turn of the 20th century.[64] Though there is nothing wrong with disposing of public land in this manner if the primary statute says so, the Land Act 1948 does not so say.

Given this hole in the black letter law, it is not surprising that recreation access advocates such as Fish and Game might seek clarification but run-holders might want no such thing. As has been observed in other property disputes, lack of statutory clarity usually serves the interest of the purported right-holder rather than the public.[65] Ambiguity allows cultural definitions of a property entitlement to supersede statutory definitions to such a degree that the 'most striking incongruity

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59 Brower, above n 4, chapter 9 'Strategic hypocrisy'.

60 Brower, above n 4, chapter 5 'The land they farm is theirs: The Lockean view of land ownership'.

61 High Country Accord 'Tenure review can provide win-win outcomes.' (Press release, 15 August 2006) <http:// www.highcountryaccord.co.nz/index.php?page=21>.

62 *Mining Law of* 1872 (US).

63 *Homestead Act of* 1862 (US).

64 Leigh Raymond and Sally K Fairfax. 'Fragmentation of Public Domain Law and Policy: An Alternative to The "Shift-to-Retention" Thesis' (1999) 39(4) *Natural Resources Journal* 649-753.

65 Ann Brower, John Page, et al (in review), 'The Cowboy, the Southern Man, and the Man from Snowy River: The Symbolic Politics of Ownership in the US, New Zealand, and Australia.'

between law and custom is how often custom wins'.[66] It makes possible a situation in which it is reasonable for Fish and Game chief executive to 'suspect that over the years the high country community has talked up the extent of their rights that go into the leases when the statute seems to state it is purely for pasturage'.[67]

Indeed the ambiguous legal landscape of high country tenure has served the runholders' interests well over the decades – contributing to Crown payouts in tenure review that are more generous than a strict interpretation of property law would have predicted.[68] As is often the case in disputes over private rights in public resources, custom favours the private interest while statute favours the public interest.[69] So the private interest often chooses to fight its battles in the media rather than in the Court room. Indeed when Fish and Game issued proceedings for a declaratory judgment, Federated Farmers immediately issued a media release likening Fish and Game to terrorists. In it, the Federated Farmers' high country chairman called Crown pastoral land 'privately held land,' and likened a pastoral lease to a residential flat tenancy.[70] He also issued a thinly-veiled threat to would-be high country anglers:[71]

> High country farming families have strong relationships with fishermen, hunters and other recreational users. This action by Fish and Game is likely to destroy this goodwill … Having firearms discharged at any time of the day or night will only serve to terrorise both livestock and families in remote areas. This would be similar to the Wild West of old.

## V. Background to the Land Act 1948

We conclude this 12 month journey by stepping back 60 years to identify the dominant high country issues preceding the enactment of the Land Act 1948. This may seem a strange chronological diversion, but it is critical to grasp the problems of the 1940s.[72] These issues influenced the legislative solutions crafted for the high country in former section 66.[73] In particular we consider the 1946 Sheep Industry Royal Commission and the parliamentary debates surrounding the passage of the Land Act. These emphasised the importance of fixity of tenure and security for improvements in creating a sustainable pastoral industry. Exclusivity of possession was prominent by its absence.

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66 Joseph Sax quoted in Leigh Raymond, 'Viewpoint: Are grazing rights on public lands a form of private property?' (1997) 50(4) *Journal of Range Management*, 437.

67 Fish and Game Councils of NZ chief executive Bryce Johnson quoted in Chris Hutching, 'Declaratory Judgment Sought on High Country Leases: Are the Leases Just for Pasturage?' *The National Business Review* (Auckland), 18 July 2008.

68 Brower, above n 4.

69 Brower, Page, et al (in review), above n 65.

70 This awkward analogy also touches on runholder's claims to 'quiet enjoyment rights'. Quiet enjoyment is a covenant (owed by the grantor) not to interfere directly or indirectly with the grantee's rights, here exclusive pasturage rights. Interferences with exclusive possession are easier to conceptualise in the case of a residential flat. It is more difficult to conceptualise exclusive occupational control over expansive areas of high country, but it is easier to conceptualise interferences with pasturage rights in such wild, isolated settings.

71 Federated Farmers, 'High Country No Wild West' (Press release, 27 August 2008).

72 Indeed the same issues were identified 28 years earlier in the 1920 Sadd Royal Commission inquiring into the condition of the southern pastoral lands; see also L W McCaskill, 'Rural Land Use', in J. Bruce Brown (ed), *Rural Land Administration in New Zealand* (1966) 70.

73 The former section 66 was transplanted into the *Crown Pastoral Lands Act* without qualification.

A Royal Commission into the Sheep Industry was set up in 1946. Its report was not handed down until 1949, shortly after the Land Act took effect. But along with the Soil Conservation and Rivers Act 1941, this commission heavily influenced thinking behind the Act as it related to high country runs.[74] The Report listed the concerns of high country sheep farmers as: the regrouping of uneconomic units created by faulty subdivisions; the safeguarding of the value of pastoral improvements; a working plan to encourage good husbandry; and the setting up of a tribunal to protect the rights of the farmer.[75]

The commission took evidence from high country run-holders in the South Island in 1946. The following exchange between Chair J M Macdonald and run-holder R C Todhunter at sittings in Lake Tekapo typifies the concerns at the time:[76]

> R C Todhunter: We must get security… before good husbandry can be practiced and confidence restored to high-country farming.
>
> Chair: Do you think a permanent right of renewal in lieu of these pastoral leases would be satisfactory?
>
> Todhunter: Unless we can have some security for our improvements, by a valuation by arbitration on termination, then no-one at present is going to put any improvements on the back country. You can't get a bank…or any financial body… – even the State Advances Corporation – to lend one penny-piece on improvements…

Other witnesses raised problems such as the lack of labour, drought, indiscriminate burning, erosion, and 'pests' including rabbits and keas. The commission was sympathetic to the run-holders. It was convinced of the need for a secure tenure but it did not recommend freeholding. Fixity was evidenced in the Chair's thinking of a 'permanent right of renewal'.[77]

As a response, the Land Act 1948 created a distinct tenure applicable to high country pastoral lands.[78] This 'new form of tenure [was] …for land classified as suitable or adaptable only for pastoral purposes'.[79] In using the term 'pastoral purposes' there was 'convincing evidence that the framers of the Act understood "pastoral purposes" [to mean] the extensive pastoralism for which such land was used in a largely undeveloped state'.[80]

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74 Other influences included the writings of Kenneth Cumberland (for example K B Cumberland, 'High Country "Run" the Geography of Extensive Pastoralism in New Zealand' (1944) 20(3) *Economic Geography* 204); and Horace Belshaw, (for example H Belshaw, Land Tenure and the Problem of Tenurial Reform in New Zealand (1948)).

75 New Zealand, Royal Commission on the Sheep Industry, Final Report (1949) 74.

76 Royal Commission on the Sheep Industry, Transcripts, Evidence Vol. IX – Ashburton to Mackenzie Country, March 9-15, 1948 DAAK 9421 D450, Lake Tekapo sittings, 12 March 1948, 10T3.

77 Ibid, evidence of C A Parker, Rollesby Station, 12 March 1948, Lake Tekapo, 10W1.

78 Section 66(1) A pastoral lease or pastoral occupation licence shall entitle the holder thereof to the exclusive right of pasturage over the land comprised in his lease or licence, but shall give him no right to the soil.

(2) Every pastoral lease or pastoral occupation licence may be subject to such restrictions as to the numbers of stock which may be carried on the land comprised therein as the Board in each case determines

(3) A pastoral lease under this Act shall be a lease for a term of 33 years with a perpetual right of renewal for the same term, but with no right of acquiring the fee simple. Section 2 defined a "Lease" as a lease granted under this Act, (emphasis added) or any former Land Act. A "Licence" had an equivalent definition, suggesting that the terms have a statutory basis.

79 Lincoln Papers in Resource Management, *Pastoral High Country Proposed Tenure Changes and the Public Interest: A Case Study*, No 11 (1983) 45.

80 The Committee of Inquiry into Crown Pastoral Leases and Leases in perpetuity, Final Report (1982) 6.

> It established the 33 year renewable lease as the standard tenure…Because of the land's susceptibility to erosion, the Act provided for Crown land in the South Island high country to be leased on special pastoral tenures with perpetual right to renewal but no right to freehold.[81]

This removal of the right to freehold went against the general tenor of the 1948 Act,[82] and was explained by Lands Minister Hon C F Skinner because of doubts as to the suitability of pastoral leases for permanent alienation, arising from public concern for soil conservation. 'The new tenure retained restrictions as to burning and cultivation without the consent of the Commissioner of Crown Lands and as previously, gave a right to pasturage only.'[83]

It was also believed that a national failure to take care of the high country would result in danger to the more fertile lowlands. 'The Soil Conservation and Rivers Control Act 1941 [was] a recognition that the hill country is also of concern to the riparian landholders dependent on river flow.'[84] Government backbencher Mr Parry, during debates on the final reading of the Bill said:[85]

> It is only in recent years… that we have come to realize the dangers in this country of soil erosion, and the danger of what good land we have being devastated because of our failure to take proper care of all the back country…the only exception that occurs in this Bill to the right of freeholding…is land which belongs to that hill country,…which is important in itself, but also for the sake of the areas of front land and good land from which the greater part of our production comes.

The Land Bill was introduced into the House on 21 October and was passed on 29 November 1948. It was not referred to the committee process after its first reading. Debates in the House stressed the interest of the Crown in these lands, and the creation of a secure tenure that encouraged investment in farm improvements, facilitated financial security, and as a consequence avoided scenarios of overstocking and land degradation. 'The changes in tenure introduced in 1948, particularly the perpetual right of renewal, created a climate of confidence which encouraged run holders to undertake development programmes.'[86]

## VI. Conclusion

The pending High Court litigation brought by Fish and Game will permit the issues identified in *Property Law in the South Island High Country – Statutory Not Common Law Le*ases, and especially their implications for access to Crown pastoral leases, to be clarified. It will also test the arguments of the Crown Law Office.

These proceedings are desirable because they will deliver transparency and certainty to pastoral tenure through the rule of law, rather than hyperbole, distortion or obfuscation of law or history. We repeat our conclusions of December 2007 that 'the journey ahead would be better served

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81 R J Maclachlan, 'Land Administration in New Zealand', in J Bruce Brown (ed), *Rural Land Administration in New Zealand* (1966).

82 The opposition National party praised the Labour Government for its commitment to private freehold title, and teased it for its apparent conversion from socialist principles, such as state leasehold.

83 Lincoln Papers in Resource Management, above 79, 46.

84 Royal Commission on the Sheep Industry, Transcripts, Evidence Vol. IX – Ashburton to Mackenzie Country, March 9-15, 1948, DAAK 9421 D450, Lake Tekapo sittings, 12 March 1948, evidence of Dr P R Woodhouse from the Soil Conservation Board, testifying as to the problems occasioned by insecurity of compensation for permanent improvements, 10YZ.

85 New Zealand Parliamentary Debates, 25 November 1948, vol. 284, 4071 (Hon. Mr. Parry).

86 Lincoln Papers in Resource Management, above n 79, 48.

by taxonomic coherence of the rights of Part 1 CPLA holders'.[87] It is now apparent that coherence of the 'rights' of the public to access these lands, would likewise serve the public good.

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87 John Page & Ann Brower, 'Property Law in the South Island High Country – Statutory Not Common Law Leases' (2007) 15 *Waikato Law Review* 48, 63.