Preliminary Paper No 20

# TENURE AND ESTATES IN LAND

A discussion paper

The Law Commission welcomes your comments on this paper and seeks your response to the questions raised.

These should be forwarded to:
The Director, Law Commission, P O Box 2590, Wellington
by Friday, 30 October 1992

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## Table of Contents

# Preface

This preliminary paper is published in the context of a review by the Law Commission of the Property Law Act 1952. At the same time the Department of Justice is reviewing aspects of the Land Transfer Act 1952 because new techology is proposed for the system of registration. The paper is concerned with certain vestiges of the feudal system which continue to dominate the theory, if not the practice, of land law in New Zealand. It advocates their partial abolition and puts forward for consideration a scheme whereby this could be achieved, preferably at the same time as the review of the Land Transfer Act is completed. The result, it is suggested, would be simplification of our land law and the abandonment of obscure methods of describing how land is owned by New Zealanders.

The paper was written by Mr B J Cameron, a former Deputy Secretary for Justice and later a Law Commission member. He and the Law Commission have been much assisted by a consultative committee, the members of which are the Rt Hon Sir Edward Somers, Chief Judge Edward Durie of the Maori Land Court, Professor Jock Brookfield of the University of Auckland, Derek Levett of the Department of Survey and Land Information, and Brian Hayes, the Registrar-General of Land.

The Law Commission calls for comments on the paper, which it would be grateful to receive by Friday 30 October 1992.

## Introduction

1 At the present day no person or group of persons in New Zealand, Maori or Pakeha, can fully own the land on which they have their home or farm or factory, or on which their church or marae stands. All land ultimately belongs to the State as personified by the Crown. To find the reason for this, one must go back to the feudal England of 900 years ago.

2 The fact that only the Crown can be the absolute owner of land is a basic concept of English and New Zealand law. It is known as the doctrine of tenure. The Crown is the ultimate owner of all land, and all land is "held" by the citizen as tenant under a grant from the Crown. What is popularly thought of as "owning land" is legally being seized of a freehold estate in fee simple in the land, which must be derived from a grant (or in England a presumed grant) by the Crown.

3 The only New Zealand exception is land still held under Maori customary title. The Maori Affairs Act 1953 defines customary land as land which, being vested in the Crown, is held by Maori or the descendants of Maori under the customs and usages of the Maori people. It is not clear how much of such land still exists, but there is certainly very little. Even in that case the Crown has paramount (or "radical") title.

4 The doctrine has recently been succinctly summarised by Fisher J in *Re van Enckevort (a bankrupt)* (1990) 1 NZ Conv C 190,589:

> Since the Norman conquest, English land has been governed by the doctrine of tenure. By that doctrine the Crown is the overlord of all land in the kingdom. Subjects hold the land as mere tenants under grants emanating directly or indirectly from that source. Strictly speaking subjects own not the land itself but merely an "estate" in the land which confers certain rights to use of the land. (190,593)

This doctrine of tenure is thus of the greatest antiquity. It comes from early feudal times. Together with the intimately inter-related doctrine of "estates", it is responsible for a good part of the artificiality of our present land law.

5 The notions of tenure and estates were carried into all parts of the United States and the Commonwealth or former Commonwealth where English common law prevailed. They did not exist in colonies acquired by conquest or cession whose previous law was that of some other European power. Thus they are unknown in Mauritius, Quebec, South Africa and Sri Lanka. In Mauritius, for example, the principles of property law are those of the Code Napoleon, the relevant part of which remains in force. Ownership of land is described without any reference to tenure or estates.

6 Even in territories acquired from non-European rulers, it is doubtful if the Crown always became paramount lord of the land as well as sovereign.

7 In most of the United States the doctrine of tenure of freehold land appears not now to exist. It was never part of the law of Louisiana, which was acquired from France. In many other States tenure has been rejected either by judicial decision or (more commonly) by their constitution or by statute. This legislation generally declares simply that all land is allodial.

8 The word **allodium** and its corresponding adjective **allodial** are Germanic in origin - *Compact Oxford English Dictionary* (2nd ed) - and are defined in Osborne's *Concise Law Dictionary* (7th ed) as meaning

> land not held of any lord or superior, in which therefore the owner had an absolute property and not a mere estate.

(And note that the term is now used in the definition of "Crown land" in the Crown Minerals Act 1991.)

9 In contrast to land, other property in New Zealand is "owned" in the full sense. The vast majority of legal systems outside the common law have no notion of tenure, and none have any doctrine of "estates" in land. Allodial land is the norm.

10 This paper therefore uses the word "allodial" to describe the complete or full ownership of land as distinct from the holding of an estate in it. It does not use the term "absolute".

11 In fact, of course, ownership, even if "complete" is rarely if ever absolute. As the New Zealand jurist Sir John Salmond said in *Salmond on Jurisprudence*:

> Ownership is the right of general use, not that of absolute or unlimited use. He is the owner of a thing who is entitled to all those uses of it which are not specially excepted and cut off by the law. No such right as that of absolute and unlimited use is known to the law. (413)

12 This is certainly true of land, which is a strictly limited resource. In terms of orthodox legal analysis, ownership includes the right to:

- possess the property;
- exclude others from the property;
- use and enjoy the property;
- the fruits of the property, including any income from it;
- dispose of the property, whether during the owner's lifetime or under his or her will.

13 The nature of a society and prevailing ideas of the public interest, and also contracts made by the owner, may impose limits on some or all of these. So in New Zealand the right to sell land to overseas residents is limited by the Land

Settlement and Land Acquisition Act 1952. The right to leave property by will to strangers, excluding spouse and children is qualified by the Family Protection Act 1955. Likewise the right to use one's land may be regulated both by legislation (eg, zoning restrictions, water rights) and by private covenants, which may originate in a contract but bind subsequent owners as well. A lessor yields the right to possess the property for the term of the lease. Many other examples could be given.

14 However, limitations of this kind on land ownership have no relation to the doctrines of tenure or estates in land. In modern times (indeed since the 17th century) these doctrines have no functional element of public interest. Limitations on ownership do not necessarily spring from them and they have not been used historically to justify the control of land rights.[1]

15 Initially in England, land was granted in return for feudal services of one kind or another. The gradual disappearance of these services, largely completed by 1660, deprived the doctrine of tenure of almost all practical significance in relation to freehold land. In New Zealand, services have never been attached to the grant of freehold land by the Crown.

16 It is important however to distinguish between "freehold" and "leasehold", the two principal forms of land tenure in New Zealand. A lessee "holds" his or her land by grant from the lessor, or in the case of a sublessee, from the superior lessee. A lease gives possession of land for a term of years in return for certain obligations set out in the lease, principally the payment of rent. In relation to leasehold therefore the notion of tenure, while perhaps unnecessary, does have a real meaning.

17 In practice the doctrine that all land is held from the Crown, which has the ultimate title, has little disadvantage except to make land law more artificial, elaborate and inaccessible to the public than it needs to be. People generally do not perceive any restrictions on their "ownership" of land. It does not increase or affect the power of the State to take land.

18 Nonetheless, the doctrine of tenure from the Crown seems to have little basis in logic, convenience or social principle in New Zealand today. ***The question is whether to do away with this remnant of feudalism.***

19 In the Law Commission's opinion, there is a good case in principle for reforming the law as to tenure of land and estates in land. This case rests on the desirability of making the law more straightforward and rational. Further, and most importantly, we believe that this could be done simply and without endangering any existing rights. Nor would it in any way limit the ability of the

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1 See however the submission of the Taupo County Council dated 5 June 1987 to the Select Committee on the Maori Affairs Bill:

> ... land title is held at the pleasure of the King or nowadays the Crown. Within that concept lies the authority to take land where necessary and subject to careful scrutiny for public purposes.

(The Commission does not accept that this statement is correct - see paras 72-74, 131.)

State (as personified by the Crown) to regulate and limit the use of land and other resources in the public interest. And it is not necessary for the Crown to have the ultimate title to land in order to carry out its obligations under the Treaty of Waitangi.

20 We include in this paper, as Appendix A, a draft scheme. In essence, it converts what are now estates in fee simple into allodial ownership, and substitutes for the terminology of other "estates" (but not the substance of the law) the terminology of "interests in land". At the same time it makes a number of minor improvements and removes a number of obscurities in the present law.

# I

# Brief history

21 The point of origin of New Zealand's present land law is the Norman conquest of England in the altogether memorable year 1066. At that time the political and social structure of most of Western Europe was feudalism, described thus by the legal historian Maitland:

> A state of society in which the main social bond is the relation between lord and man, a relation implying on the lord's part protection and defence; on the man's part protection, service and reverence, the service including service in arms. This personal relation is inseparably involved in a proprietary relation, the tenure of land - the man holds of the lord, the man's service is a burden on the land, the lord has important rights in the land, and (we may say) the full ownership of the land is split up between man and lord. (*The Constitutional History of England,* 143)

22 Historians have disputed how far Anglo-Saxon England before 1066 can be characterised as feudal. In any event however it seems that at that time the doctrine of tenure, at least in a developed form, did not exist.

> ... in the tenth and eleventh centuries the Saxon landholder was free both from customary rules ... and from the manifold restrictions ... that were the essence of feudal **dominium.** The Saxon's right was, in short, not tenure but property. (Joliffe, *The Constitutional History of Medieval England*, 74)

23 Joliffe adds that the Norman scribes imported the continental term *alod* (whence allodial) to describe the Anglo-Saxon bookland in distinction from the Norman *feudum.*

24 In a feudal system the modern distinction between sovereignty and the ownership of land was tenuous. William I asserted complete overlordship of all land in England by right of conquest. Much of that land he granted to his followers; some Anglo-Saxon nobles had their land re-granted to them but strictly as vassals of the King and not in their own right. In Joliffe's metaphor, the bond of homage was riveted into the land by the material interest of tenure (Joliffe, 136).

25 Consistently with the essence of feudalism these grants were conditional upon the performance of services, in particular the furnishing of military resources. This became known as tenure by knight's service. However a great variety of tenures came to exist - spiritual and lay, free and unfree. They carried

different conditions and different incidents. The interest of a tenant in the land held was called a **feud** or **fee.**

26 A tenant in chief (a person who held land directly from the King) could and normally did subgrant (subinfeudate) all or part of it to others, again customarily in return for services. The subgrantor in turn could subinfeudate and in theory there was no limit to the process. By the statute Quia Emptores (1289-1290) the ability to subinfeudate in fee simple (ie, to grant a fee simple out of a fee simple) was effectively abolished for subordinate tenants. The abolition was extended to tenants in chief in 1327.[2]

27 During the course of the Middle Ages most of the services that had to be performed by the tenant were commuted to money payments. As these were fixed in amount their burden became less as the value of money fell, and they gradually ceased to be made.

28 The principal residual free tenure was "socage", and it became the ordinary form under which land was held in most parts of England. By the Tenures Abolition Act 1660 most other tenures were abolished. Virtually all free ("freehold") tenure was henceforth socage. Much land in England continued to be held in the non-freehold tenure known as "copyhold", this being finally done away with in 1925.

29 Free and common socage is the only form of freehold tenure that has existed in New Zealand and other British settled colonies. It is thus synonymous with freehold.

30 Together with tenure there grew up the concept of estates in land. The second is historically and logically dependent on the first. As is said in Holdsworth's *History of English Law*

> It is not until doctrines of tenure and possession have been developed by a strong court that we get the rise of the peculiarly English doctrine of estates in the land. (Vol 2, 67)

31 Conceptually, the doctrine of estates was an answer to the question: if a tenant did not own the land itself (for the King had paramount title to all land) what did the tenant own? What was the nature of the tenant's rights? The early common law developed the abstraction called an "estate" interposed between the person entitled to land and the land itself (Lawson, *The Rational Strength of English Law*, 87). The most complete form of estate, nowadays tantamount in practice to ownership, was the estate in fee simple. The other freehold estates that have descended to modern times were the estate in fee tail and the estate for life.[3] The great non-freehold estate is the estate for a term of years, that is, leasehold. (The leasehold estate has a special and peculiar history that it is unnecessary to trace here.)

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2 See *The Property Law Act 1952* (NZLC PP16 1991) paras 126-128.

3 The life estate includes the lease for life which is also a freehold estate, rather than a leasehold estate.

32 Theoretically the doctrine of tenure does not require a doctrine of estates as it was developed and still exists. The question might have been answered in other ways. Scotland for example has a doctrine of tenure but not of estates as it is known in New Zealand. But without tenure, there would have been no need for the concept of estates at all. No legal system outside the common law appears to have a system of estates.

## II

## Transferability of land

33 Originally also, in the first two centuries after the Norman conquest, estates in land were not freely transferable. But as mentioned above the tenant in chief of land (that is, the person holding directly from the King) could in turn grant that land to another person, a subtenant, and so on, a process known as subinfeudation. This was abolished for subtenants in fee simple by the statute Quia Emptores (1289-1290) and for tenants in chief by a further statute in 1327. Henceforth an estate in fee simple was transferable, but could not be subgranted in fee simple. The prohibition of subinfeudation had no application to leasehold, which was not "real property" and was not then recognised as conferring an "estate" at all. (The sublease is effectively the subinfeudation of the leasehold estate and continues to be permitted.) Nor did it apply to other estates, such as a life estate.

34 In Ulster, where in common with the rest of Ireland English law had been imposed, persons granted plantations in the 17th century "settlement" were usually dispensed from the statute Quia Emptores and could subinfeudate by "fee farm grants". The effects are said to be still obvious in the extreme complexity of the "pyramid titles" which created great difficulty in conveying urban land; these were considered in detail in *Report of Committee on Registration of Title in Northern Ireland* (1967) Cmd 512, as noted in *Survey of the Land Law of Northern Ireland* (1971) (para 48).

35 In Scotland, which although legally a wholly separate country adopted the doctrine of tenure from England, subinfeudation is even now possible and is still used as a method of conveyancing. Indeed, restrictions in private instruments on subinfeudation were prohibited in 1938.

36 Where tenure has been abolished in the United States the statute Quia Emptores is regarded as not being in force, on the ground that it is superfluous and irrelevant: Gray, *The Rule Against Perpetuities*, 22. In New Zealand it would probably be sufficient simply to repeal that statute. This is because the repeal of a statute does not revive the previous law (Acts Interpretation Act 1924, s 20(f) applied to Imperial Acts by s 3(4) of the Imperial Laws Application Act 1988). With allodial ownership the notion of subinfeudation can have no application, and the transferability of property does not need legislation to support it (no statute empowers the transfer of most personal property). However, any problems or

doubts can be met by simply enacting that land is transferable, as is proposed in relation to the Property Law Act: NZLC PP 16, para 131. This may seem to the layperson so obvious as not to need stating, but, at the very least, it will do no harm.

37 On the other hand it would be prudent expressly to prevent ***infeudation*** - the grant of an estate in fee simple by an allodial owner - as is also proposed by the Law Commission in relation to the Property Law Act. There can be no justification for ending the Crown's power to grant estates in land while creating the same power for other owners.

## III

## Other legal systems

38 The notion that people can "own" land in the same way and to the same extent as they own furniture, cars or shares seems ordinary and natural to any non-lawyer or one who has been brought up under other European-based legal systems. The common law concepts of tenure and estates are not to be found in the land law of other Western legal systems, yet these do not lack flexibility or sophistication. The following are a few examples only.

39 ***Roman law.*** Substantially, the concept of tenure played no part in Roman law: Buckland and McNair, *Roman Law and Common Law*, 65. There were traces of such a notion prior to Justinian:

> The second anomalous figure is that of the person to whom public lands have been granted. Such grants were theoretically, and to some extent practically, subject to revocation, and the holders are called possessores. With these may be grouped the holder of provincial land, the dominium of which, at least in the Empire, is in the State. Both of these are practically owners: they have, in addition to the possessory remedies, proprietary remedies, though the forms of these are not perfectly known. The first class disappeared in the third century of the Empire when a statute definitely declared their rights to be ownership, and the second is gone under Justinian when the distinction between Italic and provincial land was abolished. It will be noticed in connexion with these lands that they give us almost the only trace in Roman law of a notion approximating to that of tenure which has played so great a part in our law and still dominates its terminology. (64-65)

40 ***France.*** French law has no doctrine of estates. Ownership attaches not to estates of various durations but to land itself. There must always be an owner and limited rights are simply an encumbrance on that.

41 ***Netherlands.*** "The reader who is familiar with the common law will look in vain for a doctrine of estates or a distinction between legal and equitable rights" - *Introduction to Dutch Law for Foreign Lawyers* (ed Fokkema), 73.

42 ***Scotland.*** Tenure was introduced in the 11th and 12th centuries following English post-Norman changes, land being deemed to be held mediately or immediately of the Crown. However the texts treat it casually and give much more prominence to possession/ownership issues. Some land - somewhere less than 20 per cent - is not subject to feudal tenure. Although land is held in Scotland allodially only in exceptional circumstances, udal land, land held by possession without any written title and free of all burdens of services or periodical payments, exists in the Orkneys and Shetlands under Udal law: see Walker, *Principles of Scottish Private Law* Vol 2 (1975) at 1202; McNeil *Common Law Aboriginal Title* 154. (In *Smith v Lerwick Harbour Trustees* (1903) 5 SC (5th) 680, noted by McNeil at 154, and by the Scottish Law Commission in *Property Law: Abolition of the Feudal System* Discussion Paper 93, July 1991 at 145, the Inner House of the Court of Session held that consequently the Crown had no radical title to the foreshore of the Shetland Islands.)

43 In 1969 a White Paper (Cmnd 4099), *Land Tenure in Scotland*, which followed a more conservative 1966 report of the Committee on Conveyancing Legislation and Practice (the Halliday Committee, Cmnd 3118), included these proposals:

(1) On an appointed day feudal tenure will be abolished, and existing vassals who are owners of the *dominium utile*, ie the present proprietors of the land, will be declared to own their land in terms of the new form of absolute ownership.

(2) From the appointed day the feuing or subfeuing of the land will no longer be allowed, nor will any other disposal of land or rights in land subject to any form of annual payment in perpetuity or quasi-perpetuity.

(3) The system of land tenure will in future be based on two forms of holding:

(a) a form of absolute ownership; and

(b) enjoyment of occupation for a term (a lease). (11)

44 The abolition of feudal tenure was supported in a subsequent Green Paper in 1972, but no action has since been taken. It has again been proposed by the Scottish Law Commission in its July 1991 Discussion Paper 93 (there is an outline of the Scottish Law Commission's proposals at 2).

# IV

## Customary laws

45 Despite some intimations to the contrary[4] the Crown did not always acquire title to land as well as sovereignty when it acquired territories from non-European rulers. It has been said that the Crown's rights are no greater than those of the local sovereign from whom it acquired the territory unless it proceeds to abrogate or diminish private property rights: McNeil, *Common Law Aboriginal Title* 156, n117.

46 However, in many places, either under indigenous systems or under the influence of English law, the local ruler had ultimate ownership of all land, eg, Benin (see *Amodu Tijani v The Secretary, Southern Nigeria* [1921] 2 AC 399) and Tonga (article 104 of the 1875 Declaration of Rights). In the Federated Malay States (pre-independence) all land vested in the ruler and was held either in perpetuity or for a term of years. The British Crown as successor in some of these places would have inherited this ultimate lordship. But generally it is irrelevant to talk of fee simple, estates, Crown grants and so on. These are manifestly unknown to customary title, which long antedated any reception of English law or "Crown grants". There is thus no tenure in the English sense, although the philosophy behind allodial land - that land belongs purely to individuals and not to the community - is often equally alien.

47 The comments of Viscount Haldane in *Amodu Tijani* are of particular interest and force in this general context:

> As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign **where that exists**. In such cases the title of the Sovereign is a pure legal estate, to which beneficial rights may or may not be attached. But this estate is qualified by a right of beneficial user which may not assume definite forms analogous to estates, or may, where it has assumed these, have derived them from the intrusion of the mere analogy of English jurisprudence. ... But the Indian title in Canada affords by no means the only illustration of the necessity for getting rid of the assumption that the ownership of land naturally breaks itself up into estates, conceived as creatures of inherent legal principle. Even where an estate in fee is definitely recognized as the most comprehensive estate in land which the law recognizes, it does not follow that outside England it admits of being broken up. In Scotland a life estate imports no freehold title, but is simply in contemplation of Scottish law a burden on a right of full property that cannot be split up. In India much the same principle

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4 Eg, Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (625). This was on the footing that the Crown's ultimate ownership of land was an inherent incident of sovereignty under British constitutional law, a so-called "major prerogative" (557-561).

applies. The division of the fee into successive and independent incorporeal rights of property conceived as existing separately from the possession is unknown. (403) [Emphasis added].

## V

## United States

48 Originally English property law, and consequently the doctrines of tenure and estates, were part of the law of the American colonies. Nor did it necessarily follow that tenure disappeared along with the sovereignty of the British Crown. The common law continued to be the basic law of the new States, and the owners of fee simple estates might henceforward have held their land from the State. Indeed this remains the position in some States, eg, Georgia, South Carolina and perhaps Pennsylvania.

49 However, tenure has on the face of it been done away with in the great majority of States either by their constitution, by legislation, or through judicial decision. Thus in Minnesota for example, s 15 of the 1857 Constitution declared that all land shall be allodial. The same provision is in s 13 of the New York and s 14 of the Wisconsin Constitutions, and in that of Arkansas, which goes on to prohibit "feudal tenures of every description, with their incidents." Tenures were abolished in Virginia as early as 1779, and by derivation in a number of the North West Territory States formed within the very large boundaries of post-colonial Virginia, and in Connecticut in 1793. The ownership of land was declared to be allodial by statute in Kentucky.

50 The courts in some other States, for example California and Maryland, have held that tenures do not exist in the State and that all land is allodially owned.

(See Gray, *The Rule Against Perpetuities*, para 23, for a discussion of tenure in various States which provides references to each of the constitutions above referred to.)

51 What all this adds up to is another matter. Kent (4 Commentaries 2) called it a change without substance. In New York, for example, the section of the constitution declaring the ownership of land to be allodial was preceded by s 11, providing that:

> The people of this State, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the State; and all lands the title to which shall fail from a defect of heirs, shall revert, or escheat to the people.

52 One may speculate that one purpose of the legislation was symbolic, to remove the shadow of Royal government. On the practical side it served the limited end of doing away with vestigial feudal obligations attaching to land,

notably the quit-rents that existed in a number of the former colonies and were a serious source of grievance before the American Revolution. (See William R Vance "The Quest for Tenure in the United States" (1924) 33 Yale LJ 248.) The purpose cannot have been to make substantial reforms of property law. Estates in fee simple and life estates, along with reversions, vested and contingent remainders, and the rest of the inherited paraphernalia, continue to be part of American property law except in Louisiana. But, as in New Zealand, a great many jurisdictions have abolished estates in fee tail.

## VI

## The New Zealand law

53 New Zealand is a typical instance of the virtually unquestioned application of the orthodox doctrines of tenure and estates to settled British colonies. It was roundly asserted in *Veale v Brown* (1868) 1 NZCA 152:

> The feudal system, long extinct in England itself as a social and political force, is yet the source of all the doctrines of the English law of real property. It is a fundamental principle of that law that all lands are holden of some superior lord ... . In other words, the doctrine of tenure is a fundamental principle of the English law of real property; and to say that the doctrine of tenure is not to prevail in this Colony is as much as to say that the English law of real property is not in force here. This we may safely treat as an absurdity. (157)

54 Yet issues were raised (although largely swept under the carpet) in relation to Maori customary title. Of its nature that title predated British sovereignty. It was recognised by Pakeha law (whether by common law or by statute). Equally it could not sensibly be regarded as deriving from the Crown, still less from any Crown grant. The current Canadian view is that this indigenous title is a legal burden (of unclear jurisprudential nature) on the Crown's ultimate title (*Re Calder v Attorney General of British Columbia* [1973] SCR 313; 34 DLR (3d) 145, *Re Guerin* [1984] 2 SCR 335; 13 DLR (4th) 321 - which described the native interest as sui generis; *R v Sparrow* (1990) 70 DLR 4th 385; *Delgamuukw v British Columbia* (1991) 79 DLR 4th 185. And see W I C Binnie "The Sparrow Doctrine: Beginning of the End or End of the Beginning" (1990) 15 Queen's LJ 217). Compare the judgment of the Privy Council in the New Zealand case of *Manu Kapua v Para Haimona* [1913] AC 761:

> ... the land in question had been held by the natives under their customs and usages. ... As the land had never been granted by the Crown, the radical title was ... vested in the Crown subject to the burden of the native customary title to occupancy. (765)

55 So the constitutional principle behind the doctrine of tenure applied to customary land, but the doctrine of estates did not. The course of 19th century New Zealand legislation and several cases show this clearly.

56 *R v Symonds* (1847) [1840-1932] NZPCC 387 was a test case brought to determine the validity of Fitzroy's waiver of the Crown's exclusive right to purchase native land and to determine the nature of the term "pre-emption" in Article 2 of the Treaty of Waitangi. The principal judgment was that of Chapman J who held that the Crown was the exclusive source of private, ie settler, title. But in doing so he affirmed the legal validity of Maori title, and observed

> ...it is not at all necessary to decide what estate the Queen has in the land previous to the extinguishment of the Native title. ... the full recognition of the modified title of Natives ... is not theoretically inconsistent with the Queen's seisin in fee as against her European subjects.[5] (391)

57 In *Re The Lundon and Whitaker Claims Act 1871* (1872) 2 NZCA 41 the Court of Appeal said that the Crown was bound by the common law to a full recognition of Native proprietary right. The extent of that right depended on "established Native custom". But the Court went on to point out that all title to land by English tenure had to be derived from the Crown. This is an important distinction for several purposes, and throws light on other New Zealand decisions. Thus in *Mangakahia v New Zealand Timber Co Ltd* (1884) 2 NZLR 345 (SC) Gillies J (perhaps debatably) held that ownership of land according to native custom did not carry the incidents of ownership under a Crown derived title. It was certainly not ownership in fee simple. Accordingly, an action for trespass based on a right to possession (as distinct from actual possession) did not lie.

58 The language of 19th century native land legislation was consistent with this. For instance the Native Land Court Act 1865 recited that it was "expedient to amend the laws relating to lands ... which are still subject to Maori proprietary customs, and to encourage the extinction of such proprietary customs and provide for the conversion of such modes of ownership into titles derived from the Crown". "Native land" was defined as "lands which are owned by Natives under their customs and usages", as distinct from "hereditaments" - land subject to tenure or held under a title deriving from the Crown. The Act posited that all title to land in New Zealand was **not** derived from the Crown.[6]

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5 The full text reads:

> ... I think that it is not at all necessary to decide what estate the Queen has in the land previous to the extinguishment of the Native title. Anciently, it seems to have been assumed, that notwithstanding the rights of the Native race, and of course subject to those rights, the Crown, as against its own subjects, had the full and absolute dominion over the soil, as a necessary consequence of territorial jurisdiction. Strictly speaking, this is perhaps deducible from the principle of our law. The assertion of the Queen's pre-emptive right supposes only a modified dominium as residing in the Natives. But it is also a principle of our law that the freehold can never be in abeyance; hence the full recognition of the modified title of the Natives, and its most careful protection, is not theoretically inconsistent with the Queen's seisin in fee as against her European subjects.

6 The current legislation, the Maori Affairs Act 1953, defines customary land as land which, being vested in the Crown, is held by Maori or the descendants of Maori under the customs and usages of the Maori people.

59 Putting aside the status of Maori customary land, the only relevant major reform in New Zealand has been the abolition of estates tail (which seem to have been rare to the point of non-existence here) in 1952 and their conversion into fee simple: Property Law Act 1952, s 16.

60 Two other points may be noted. First, although at the beginning New Zealand land law strictly followed English doctrines it was nonetheless simpler. All land granted by the Crown, other than by lease or other temporary tenures such as the deferred payment licence, was freehold ("free and common socage"), and no services attached to it. (In England before 1925 some land was "copyhold" with different incidents, and other special rules survived.) Second, a great deal of Crown land was granted by way of statutory leases of different forms. Much land, particularly in the South Island high country, is still held on Crown lease.[7] Our proposals would have no effect on the status of this land.

61 The present governing statute is the Land Act 1948, s 62 of which states the terms on which Crown land may be acquired. These are, in effect, statutory tenures, although in the nature of leases

(a) land, other than pastoral land, may be taken on renewable lease or purchased. A renewable lease is a lease for a term of 33 years with a perpetual right of renewal. In certain cases the lessee has the right to acquire the fee simple (s 63).

(b) pastoral land - defined somewhat elliptically as land that is suitable or adaptable primarily for pastoral purposes only (s 51) - may be acquired on pastoral lease (s 66) or pastoral occupation licence (s 66AA). Pastoral leases are also for 33 years with a right of perpetual renewal. They give an exclusive right of pasturage but no right to the soil or right to acquire the fee simple, and may be granted subject to stocking restrictions. They bear some resemblance to a "profit", ie, the right to take some substance from land which is the property of another, rather than a true lease.

62 These and other provisions of the Land Act will need consequential amendments of a procedural nature if the changes proposed in the scheme are made.

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7 As at 31 March 1987, 412 pastoral leases and licences were current, relating to over 2,855,000 hectares.

# VII

## Modern English developments

63 The great property reform legislation of 1925 in England - the Law of Property Act - did not touch the doctrines of tenure or of estates, but confined the legal (as distinct from equitable) interests that could be created to fee simple absolute in possession and leases "for a term of years absolute". All interests derived out of the fee simple must be equitable: Megarry and Wade *The Law of Real Property*, 123.

64 The position after 1925 has been summarised thus:

> "Land is still the object of feudal tenure; the Sovereign remains the lord paramount of all the land within the realm; every parcel of land is still held of some lord ... and the greatest interest which any subject can have in land is still an estate in fee simple and no more"[8]. The title "tenant in fee simple" is still the technically correct description of the person who is popularly regarded as the owner of land, and every conveyance in fee simple substitutes the new tenant for the old as provided by the statute *Quia Emptores* (1290). Nevertheless, as will be seen, for all practical purposes ownership in fee simple "differs from the absolute dominion of a chattel in nothing except the physical indestructibility of its subject"[9]. Our law has preferred to suppress one by one the practical consequences of tenure rather than to strike at the root of the theory of tenure itself. It remains possible, therefore, that in rare cases not covered by the statutory reforms recourse may have to be had to the feudal principles which still underlie our land law. (Megarry and Wade, 37)

65 The English Law Commission proposed the abolition of freehold tenure in a draft Statute Law Reform Bill which was circulated to interested parties in 1968.[10] A draft clause 2(1) provided

> All freehold tenure of land is hereby abolished to the intent that a legal estate in fee simple absolute in possession (including any such estate of a corporation) shall, subject to any encumbrances, be at law, but without prejudice to any equities, equivalent so far as the law permits to absolute ownership and all existing seigniories are extinguished accordingly.

66 The proposed clause 2 was removed from the draft Bill before the Commission published its report on the Statute Law (Repeals) Bill, Law Com No 22 *Statute Law Revision: First Report* (Cmnd 4052). Those who were given the opportunity to comment on the proposal before formal publication, who

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8 Cyprian Williams "The Fundamental Principles of the Present Law of Ownership of Land" (1931) 75 LJ 848.

9 Challis *The Law of Real Property* 3rd ed 1911, 218.

10 A response to the proposal is noted in the Conveyancer's Notebook (1968) 32 The Conv 161.

included representatives of the legal profession, were able to persuade the Law Commission that the abolition of the doctrine, in the form proposed, had practical limitations.[11]

## VIII

## Statutory reforms elsewhere

67 The doctrines of tenure and of estates have been abolished in several former British colonial territories where the common law prevailed. Perhaps the most interesting is Kenya. It is noteworthy that the changes here were effected prior to independence, under the aegis of English lawyers, and in a country where significant English settlement had taken place. Note also that in this and other cases action was taken as part of the introduction or general revision of the land registration system and of real property law in relation to registered land.

68 Under s 27 of the Kenya Registered Land Act 1963:

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

69 This was based on legislation prepared for Lagos (Nigeria) in 1960, which because of political and constitutional vicissitudes was not adopted there. The report of the Lagos Working Party said this:

> We have prepared this draft on lines which indicate how we can achieve the desired security of ownership with facility for transfer without importing (or even giving the appearance of importing) all the mumbo-jumbo of English land law. We considered in particular whether we should use the word "freehold" which has acquired a special significance in colloquial parlance, but decided that as we really meant absolute ownership it was better to say so.[12]

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11 The proposal of the Law Commission was also considered by the Land Law Working Group for Northern Ireland - see the consideration of the proposals of the Land Law Working Group at para 85.

12 This comment, taken from the Lagos Working Party Report (1960) at 17, is set out in S Rowton Simpson *Land Law and Registration*, at 496.

70 The Kenyan Act makes no mention of estates, nor does it provide for the equivalent of estates tail or life estates. This could be a reflection of the modern English law, where since 1925 only fee simple and leasehold estates can exist as legal (as distinct from equitable) forms of land ownership. On the other hand (and unlike what is sometimes said to be English law - see para 63) Kenya permits leases for life as well as for a term of years - s 45.

71 The Kenyan approach had by 1975 been followed in Malawi, in the Solomon Islands, and, although with some notable differences, in the Seychelles - S Rowton Simpson, *Land Law and Registration* at 455, 457, 460.[13]

## IX

## The Crown's power to take land

72 The existence of any royal prerogative (or residue of authority belonging to the Crown) to take land is a matter distinct from the Crown's allodial interest in the land arising by operation of the doctrine of tenure. The rules applicable to the royal prerogative in its operation in New Zealand were the rules of common law; and in fact it is said that the royal prerogative is a creature of the common law (*Halsbury's Laws of England,* 4th ed, vol 8, para 890).

73 However, the royal prerogative may be abrogated by legislation. If Parliament has enacted legislation to achieve what might formerly have been done by exercise of the royal prerogative, then the statute should prevail. Thus any prerogative right in relation to the taking of land for public purposes is presumably overtaken by the acquisition and compensation provisions in the Public Works Act 1981.

74 To remove any doubt about the possibility that a royal prerogative remains - leaving aside the royal prerogative to requisition land in a wartime emergency which should remain as a special case - the draft scheme proposes that the Crown should only acquire any land or any interest in land pursuant to an enactment or by agreement (see cl 8 of the scheme) with an express saving of the prerogative to requisition land in wartime. This would be consistent with the Law Commission's recommendations in NZLC R22, *Final Report on Emergencies* (and see para 130 of this paper).

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13 In the Seychelles the corresponding legislation dealt with the position of the proprietor of a usufructuary interest and of a charge to accord with existing laws there. The Seychelles would appear to have a civil law system of land law, under which a "usufruct" is the approximate equivalent of the common law life interest.

# X

## The case for change

75 First, the feudal origin and significance of the doctrine of tenure have no relation to contemporary New Zealand. It may be thought remarkable that the manner of land ownership in New Zealand in 1992 reflects English feudalism of 900 years ago. While there is no generally perceived sense of inadequacy of land ownership rights, and change should not be made frivolously, or perhaps in isolation, the opportunity should be taken to do away with an obsolete doctrine if that can be done in a simple manner and without undermining the present system.

76 Second, the doctrine of tenure is now a fiction, inconsistent with modern notions of property and with a modern land law. If it had any practical consequences it would be politically unacceptable. One may recall the leasehold v freehold battles in New Zealand during the period 1880-1910, in which the policy of giving settlers land by way of long-term leases at generally very low rents was roundly rejected and has never been seriously revived.

77 Third, few branches of the law are so governed by arcane and archaic terminology. The certificate of title of an "owner" of land in New Zealand under the land transfer system recites that "X Y is **seized** of an **estate in fee simple** (subject to such reservations, restrictions, encumbrances, liens and interests as are notified by memorial under written . . . [in certain land]". This is doubly obscure. Yet ownership of land concerns everyone. Most of us are or hope to be owners, most of us deal in land at some time. Any changes that help to make this part of the law more intelligible are desirable unless they have overriding ill consequences.

78 Fourth, the proposed automation of the land transfer register will provide a convenient and perhaps unique opportunity to move to more modern forms and concepts. These will themselves assist the automation.

79 Fifth, it is illogical that where the Crown owns land by acquisition or purchase it may hold the land in fee simple from itself. The law ought to move away from fictions of this kind.

80 Sixth, no one creating a new property system today would contemplate introducing the concept of tenure.

# XI

## The scope of reform

81 If there is to be change, is it feasible to declare that the owner of an estate in fee simple in a piece of land becomes the (allodial) owner of that land, and leave it at that? The aim would be not to affect the concept of tenure in other cases (notably between lessors and lessees) or the doctrine of estates. This is what the United States statutes appear to have done. Analysis suggests however that to stop there is neither logically nor conceptually sound, nor perhaps is it adequate if the law is to be sensibly modernised. As well, it could create unnecessary uncertainties and problems that only litigation could resolve.

82 The term "estate" has more than one meaning, even to lawyers. It may mean the whole of a person's property, and this is probably the most common. Thus we speak of the "estate" of a bankrupt or of a deceased person. "Real estate" means simply land, as in the term "real estate agent". Popularly it also has the meaning of a large piece of land. In the present context however it refers to the nature of certain interests in land - freehold or leasehold or a particular kind of freehold, notably "in fee simple".

83 All estates in land are interests in land but not all interests in land are estates.[14] So a mortgagee has a charge over the land,[15] a landowner may have a right of way over someone else's land (an easement) or a right to take some substance eg, gravel from that land (a "profit"), and so on. These are not "estates". They are interests in land, some of them, eg, easements and profits, described in the terminology we have inherited from feudal times as incorporeal hereditaments.[16] (An estate on the other hand is a "corporeal hereditament", on the basis that it is something real and tangible and not just a right. In truth, an estate in land is as abstract and therefore incorporeal a thing as can be imagined. For present purposes the terms corporeal and incorporeal can be ignored.)

84 The American Restatement of the Law of Property defines an "estate", for the purposes of the Restatement as

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14 What is sufficient to constitute an interest in land has its own problems and uncertainties: see the jungle of cases cited in 3 *Stroud's Judicial Dictionary* 5th ed 1333-6, most of them interpreting the words used in numerous statutes. To reconcile these decisions would be a herculean task.

15 See s 100 of the Land Transfer Act 1952 and the Law Commission proposals in relation to the mortgage as a charge in NZLC PP16 at para 282; if those proposals are adopted, the only exception to the rule that all mortgages are charges will be the circumstance of the mortgage or submortgage by way of registered memorandum of transfer.

16 And it is worth noting in this context the observation of Cooke P in *Tainui Trust Board v AG* [1989] 2 NZLR 513 that

> ... a right to work mines and carry away the minerals won is an incorporeal hereditament (because it is a right over land in the possession of another). If of indeterminate duration it is a freehold interest; if of fixed duration a chattel interest. In either case it is an interest in land (*Webber v Lee* (1882) 9 QBD 315) but not an estate in the narrowest sense of that term as it does not give use of the parcel of land as a whole. (523)

an interest in land which:

(a) is or may become possessory;

(b) is ownership measured in terms of duration. (23)

This seems an appropriate definition for the purposes of New Zealand law as long as one bears in mind that there has to be an "interest in land" as well as a right to possession. Estates are a subspecies of interests in land. A licence, for instance, gives the licensee lawful possession. But a licence does not amount to an interest in land: see *Street v Mountford* [1985] AC 809.

85 In Northern Ireland, the *Survey of the Land Law of Northern Ireland* (1971), by a working party from the Queen's University of Belfast, proposed the abolition of feudal tenure (paras 37 - 38). Twenty years later, in *The Final Report of the Land Law Working Group on the Law of Property*, the Office of Law Reform (Department of Finance and Personnel for Northern Ireland), recommended against the adoption of this proposal (vol 1, 58-59). Its comments are not without interest in the present context. The Survey had proposed that the "fee simple estate in possession should become absolute ownership, but still subject to any **estates** ... to which it is now subject." It was pointed out in the report that the word "estate" had no significance outside the feudal context and that the proposal amounted to cutting away a basic principle of land ownership while keeping a whole vocabulary that was inexplicable without it. The report added: "A change in language would be apt, and probably readily digested, if all titles to land were registered" - which for all practical purposes is the state of affairs in New Zealand.

86 If owners in fee simple are to become allodial owners, they will own the land itself. It would be meaningless and contradictory to say that owners have any estate in the land or that they will any longer hold it "in fee simple". So to this extent at least the concept of "estate" must disappear. That is not to say that it has to be expressly abolished.

87 Life and leasehold interests however require a more detailed examination. The question is how any changes can best be accommodated.

88 The relationship between the doctrines of tenure and estates is both integral and intricate. As pointed out above in the Introduction, the second flowed from the first. Under the doctrine of tenure, whereby all land was held from the Crown, the question had to be faced: what was it that the King's tenant owned? This was answered by the doctrine of estates. The law created an abstract entity called the estate and interposed it between the tenant and the land. Ownership was thus of something wholly conceptual or fictional:

> As the law of real property became distanced from the physical reality of land and entered a world of almost mathematical abstraction, it was possible to accord an *immediate* conceptual reality to each "slice" of time represented by an "estate". (Gray, *Elements of Land Law*, 59-60)

89 So the notion of estates enabled land ownership to be divided in respect of time:

> ...the land itself is one thing, and the estate in the land another thing, for an estate in the land is a time in the land, or land for a time, and there are diversities of estates which are no more than diversities of time... *Walsingham's Case* (1573) 2 Plowden 547, 555; 75 ER 805, 816.

90 But the rights of ownership can be divided in time without the need for conceptual fictions. There are no estates in chattels but the leasing of chattels is commonplace. For example A can have exclusive possession of B's motor car (either conditionally or unconditionally) for one year. The lessor B will continue to own the car, and will resume possession of it after the year has elapsed.

**Life interests**

91 Can the principle that ownership can be divided in terms of time be used to make those who are now life tenants allodial owners for the period of their life? This would mean that the person who is to own the land after the life owner's death has merely a future ownership.

92 There is no problem with ownership of a future interest as such; it is possible now and ought certainly to be retained. Three considerations arise, however:

- *First, to make life tenants allodial owners for the period of their life would seem to reduce what is (at least in many cases) a present fee simple interest of the person who is to take after cessation of the life interest into a mere future right, as the examples below show.*

- *Second, on several points the present law is obscure or unsatisfactory and clarification is desirable.*

  **Example 1.** A (a fee simple owner) transfers his land to B for life without doing more. In that case A has what is technically called a **reversion.** The land goes to him or his successors on B's death, and there seems little doubt that even during B's life A retains a fee simple estate subject to B's life estate.

  **Example 2.** A transfers the land to B for life with **remainder** to C, who is alive at the date of the transaction. In that case A has divested herself completely of her interest in the land. C is said to have a **vested remainder,** and according to modern standard English textbooks appears to be the fee simple owner subject to B's life interest. On the other hand, in Burton, *Real Property*, it is said that

  > ...if the owner make an alienation at once of the whole fee simple, he divests himself entirely of every feudal relation; and the Feofee, though he have only a particular Estate, holds immediately of the Lord, and not of him to whom the Remainder is given. (8-9)

The position cannot be said to be certain.

**Example 3.** The remainder is given to such of C's children as are living at B's death. These children may or may not have been born. Their remainder is **contingent.** Who owns the fee simple in the meantime?

Although contingent remainders have been recognised by the law for centuries, surprisingly the answer to this question also is uncertain. The fee simple might revert to the Crown for the duration of the life estate, so that the life tenant would hold immediately from the Crown. Alternatively:

> Some said that ... the fee simple was in abeyance, or in the clouds, or in the bosom of the law; others argued on the principle that what the grantor had not conveyed away he still had in him and so said that the fee simple remained vested in the grantor or, if he was dead, his devisee or heir. The question was never finally settled, but the latter view more nearly corresponds with modern ideas. (Megarry and Wade, 182-183)

In none of these examples apparently can either A or C get a certificate of title for the fee simple interest while B is alive: Land Transfer Act 1952 s 95(2).

**Example 4.** A leases land to B for B's life, with remainder to C. It seems that such a lease, which is recognised by s 115 of the Land Transfer Act, anomalously confers not a leasehold but a freehold interest for life. *(Amalgamated Brick & Pipe v O'Shea* [1966] 1 NZCPR 580; *Sinclair v Connell* [1968] NZLR 1186.) If the remainder is vested, C presumably has the fee simple and enjoys the benefits of the covenants in the lease. But who can re-enter if B is in breach? A or C? If the lease is a "freehold", it is at least arguable that no one can, though the probable answer is that C can re-enter. These uncertainties are practical and not merely academic defects.

Conceptually, a lease is quite a different creature from a life estate, and in practice a whole body of law is applicable to leases that has no relevance to life estates. Preservation of the lease for life is sensible considering that a lease may be granted for a period long exceeding the duration of any possible life, but its nature should be clarified.

- *Third, the **quality** as well as the duration of the life estate is inferior to the estate in fee simple.*

In particular, at common law the life tenant is liable for what is called "voluntary waste". This is the commission of positive acts which diminish the capital value or alter the nature of the land (including buildings and structures on it). For example, it is voluntary waste to

pull down a shed. Still less is the life tenant permitted to cause wanton damage to the land.

93 In the Commission's view, a life estate is properly to be regarded as a dependent interest, the fee simple (at present) or the allodial ownership (under the scheme) always being vested in someone else. This is, of course, the status of a lease, even a lease for a very long term. And just as a lease is subordinate to the superior title of the fee simple proprietor, the present life estate could sensibly be so regarded if allodial ownership were introduced. This is what the scheme proposes. It also takes the opportunity to eliminate obscurities and anomalies.

**Leases**

94 What is the significance of the fact that a lessee has an "estate" in the land? Does it add anything to the fact that a lease gives exclusive possession of the land in accordance with its terms, a possession that the law recognises and will enforce by appropriate remedies? Is the description of a leasehold interest as an estate simply a theoretical way of classifying it? If so, it does not seem to matter whether or not any legislation calls a leasehold interest an estate, but it might be better to get away from the old terminology altogether. However, care is necessary in making any change in the terminology not to create an impression that subleasing is no longer permitted. The scheme proposed does not and is not intended to affect a lessee's ability to create subleases in accordance with the rules which presently apply to leasehold and subleasehold estates.

## XII

## Maori land

95 The Law Commission is required by its constituting statute to take into account te ao Maori (the Maori dimension) in all its recommendations. So it is necessary to consider Maori land in the context of the changes the Commission is suggesting in this paper.

96 Maori land is not to be equated with land owned by Maori. Many Maori have acquired for homes, farms and businesses land that has already been alienated by the Crown - land that the Maori Affairs Act 1953 calls "general land". There is no way of knowing how much "general" land is in Maori hands, but its acquisition, holding and disposal are governed by the same laws irrespective of who owns it. It need not be considered separately.

97 Maori land proper is the remnant of land in New Zealand that has never passed out of its original Maori ownership. Maori land may be Maori freehold or Maori customary land. Almost all of it is in the first category. It is land the ownership of which has at some time been ascertained by the Maori Land Court and for which a fee simple title under English tenure has been granted.

98 Maori freehold land poses no problems under our proposals. Like other land it will be converted to allodial land owned by whoever holds an estate in fee simple in it at the date of the conversion. Of course it will continue to be governed by the special laws now applicable to Maori land. Nothing in our proposals is to be taken as altering these.

99 The question of Maori customary land, on the other hand, is sensitive. In s 2 of the Maori Affairs Act, Maori customary land is defined as "land which, being vested in the Crown, is held by Maoris or the descendants of Maoris under the customs and usages of the Maori people".

100 The Maori Affairs Bill, introduced in 1987 to replace the 1953 Act, takes quite a different approach. Clause 141(2)(a) simply provides that land that is held by Maori in accordance with tikanga Maori has the status of Maori customary land. By cl 143 the Maori Land Court has jurisdiction to determine and declare the particular status of any parcel of land. No reference is made to the Crown, and it is not clear whether this is meant to change the fundamental status of customary land. We are inclined to think it is not.[17]

101 Maori customary land is not held under any form of English tenure; nor is it an estate in the land. At first sight therefore proposals to do away with freehold tenure and the terminology of estates are irrelevant to customary land, which can properly be ignored.

102 The matter is, however, not so simple. The essence of what we propose is to convert the estate in fee simple into full (allodial) ownership. What is now freehold land would no longer be held from the Crown. But if this is done only for land that the Crown has granted, could the status of Maori customary land be said to have been relatively depreciated? Such land would continue to be vested in the Crown as allodial owner, although held by Maori on a basis that (given the continuance of s 155 of the Maori Affairs Act) is not legally enforceable against the Crown.

103 In principle, the proprietors of land subject to Maori custom would seem to have as good a claim to allodial ownership as a person holding under English tenure. Indeed, since Maori ownership long antedates any Crown title, which began in 1840, the claim could be considered stronger. It might be argued that failure to give equivalent status to customary ownership is hard to reconcile either with Articles 2 and 3 of the Treaty of Waitangi or with the rule of law.

104 The prevailing view is that hardly any Maori customary land now remains, although exactly how much is uncertain. Virtually all land in New Zealand has been acquired by the Crown free of Maori title - either by the operation of law,

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17 The phrase "being vested in the Crown" seems first to have appeared in the Native Land Act 1909. The equivalent definitions in the Native Land Act 1894 and earlier legislation did not include it. The explanatory memorandum to the 1909 bill, written by Sir John Salmond, does not refer to it directly. His purpose may well have been to emphasise the Crown's underlying title, but he would certainly not have thought he was altering the law by inserting it: see *Manu Kapua v Para Haimoana* [1840 - 1932] NZPCC 413, 416; [1913] AC 761, 765. Equally, omitting it from the Bill and reverting in this respect to 19th century formulas is unlikely to be held to overturn what has been generally taken for granted.

by confiscation or by purchase - or has been converted under successive Maori land legislation into Maori freehold land held for an estate in fee simple. It may be significant that only one of the submissions to the select committee on the Maori Affairs Bill 1987 made any mention of customary land or of s 155. This was a submission by Mita Carter and Wiremu Mikaera in relation to fishing reserves on the South Wairarapa Coast. It has been described to us as not being an issue for most Maori people. Yet the principle remains. And there is an element of question begging in an assertion that the amount of Maori customary land is now negligible. It supposes that the acquisition of Maori customary land by the Crown was always valid and effective, and even apart from s 155 of the Maori Affairs Act could not be challenged. This is not inevitably so.

105 There are active and contentious questions about where the burden ought to lie of showing whether a piece of land is Crown land or Maori land. Some would argue thus. Indubitably, all land in New Zealand was originally owned by Maori, and at common law and under both the Treaty of Waitangi (as interpreted in *R v Symonds* [1840-1932] NZPCC 387) and subsequent statutes only the Crown could legally acquire land from them: the doctrine of the Crown's right of pre-emption.[18] Notwithstanding the Crown's radical title, therefore, it should be for the Crown to show that it had lawfully extinguished Maori title. This might be

(a) by operation of the common law, as arguably in respect of the foreshore,

(b) by statute, as in the case of confiscations during the New Zealand Wars and perhaps of riverbeds,

(c) by purchase or by gift from the Maori owners.

In other words, the burden of proof is on the person who claims to own land as against the former owners.

106 There is a logic to this which makes it impossible to simply dismiss. However, we do not think it really impinges on our proposals. These do not assume any particular answer to the location of the burden of proof. At the level of pleading the burden would depend upon the way in which the issue came up - who was the plaintiff and what relief was sought. If, for example, the Crown alleged that a Maori was wrongfully in possession of Crown land that was free from customary title, the Crown must prove the status of the land. If a Maori sought a declaration that certain land occupied by the Crown was customary land (setting aside s 155 of the Maori Affairs Act) the burden of proof would be on the Maori claimant.

107 The deeper issue - whether land should be assumed to be Crown land on the one hand or Maori land on the other - is a political one that the Commission does have to answer within the context of this paper.

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18 A useful discussion of the Crown's right of pre-emption can be found in Dr Paul McHugh's book, *The Maori Magna Carta, New Zealand Law and the Treaty of Waitangi*, at 78-80.

108 ***The choice thus lies between converting Maori customary title to allodial ownership and making no change in the present position.*** Against changing the existing status of Maori customary land through the present proposals is that the scheme's purpose is neither to diminish any property rights of Maori that modern jurisprudence might recognise, nor by a sidewind to enlarge Maori rights against the Crown. These questions are for another occasion.

109 To give Maori customary land the character of full ownership as against the Crown might create alarm (however unfounded) on one side and unjustified expectations on the other. Would it be possible to claim allodial title to land whose acquisition by the Crown was disputed? At present such claims would be blocked by ss 155 and 157 of the Maori Affairs Act. Section 155 provides that Maori customary title is not available or enforceable by proceedings in any court against the Crown. Under s 157 a proclamation by the Governor-General that any land vested in Her Majesty is free from Maori customary title is to be conclusive of the fact proclaimed. The Maori Affairs Bill at present before Parliament would repeal those sections along with s 156 and 158 - presumably for the sort of reasons suggested in the Law Commission's background paper on Maori fisheries: *The Treaty of Waitangi and Maori Fisheries - Mataitai: nga Tikangi Maori me te Tiriti o Waitangi* (NZLC PP 9) at 119ff). But the effect of the simple repeal in combination with s 6 of the Limitation Act 1950 could be to allow the validity of past acquisitions of Maori land to be reopened judicially.

110 Moreover, a mechanism now exists in the form of the Waitangi Tribunal for hearing grievances about the loss of land and making findings on them. In this tribunal the parties stand on an equal footing and issues are decided on the basis of history and substantial justice. Irrespective of what we might recommend, this route will remain. It may well be the most suitable way to deal with issues of this nature.

111 This avenue has an additional advantage. If the Crown alienates or otherwise disposes of land to anyone, that person takes the land free of any Maori customary title. This appears to be the effect of s 158 of the Maori Affairs Act 1953 (not repeated in the 1987 Bill). It reads

> No Crown grant, Crown lease, or other alienation or disposition of land by the Crown ... shall in any Court or in any proceedings be questioned or invalidated or in any manner affected by reason of the fact that the customary title to that land has ... not been extinguished.

112 Even in the absence of that section, a registered proprietor of land under the Land Transfer Act is protected: s 62 Land Transfer Act.

113 However, ss 27 to 27D of the State-owned Enterprises Act 1986, as inserted by s 9 of the Treaty of Waitangi (State Enterprises) Act 1988, contain a code effectively overriding this where land is disposed of to a State-owned enterprise and a claim is made in respect of that land to the Waitangi Tribunal. The Land Transfer title is expressly subject to the Crown's right to take the grant back in order to satisfy a recommendation of the Waitangi Tribunal.

114 On balance, the Law Commission believes that it is best to leave the status of customary land aside. Our proposals are therefore intended to be neutral on this issue - see cl 2 of the scheme at 34, and clause 15 at 56.

## XIII

## Issues of abolition

***Is abolition of tenure worth doing by itself?***

115 We do not propose that abolition of tenure be undertaken on its own. Rather, it can be done concurrently with the review of the Land Transfer Act now being undertaken by the Department of Justice. (The Law Commission's review of the Property Law Act will precede it but any new Property Law Act can easily be adapted to be consistent with the scheme.) The opportunity to get rid of anachronisms is unlikely to recur for a long time. Moreover, the forthcoming computerisation of the land register which has provided the impetus for the review of the Land Transfer Act provides a natural and convenient opportunity to make a change.

***Would difficulties arise from the fact that arrangements have been tailored for 150 years to fit the present system, however inappropriate it is in the abstract?***

116 This is the question that will properly be asked. We do not believe that any such difficulties will arise from the scheme which is proposed.

## XIV

## Objections and responses

117 *First, to abolish freehold tenure would subtly diminish the "public" character of land and its social dimension, and encourage the perception that land is a mere commodity like any other property. The Law Commission's obligation to take into account te ao Maori (the Maori dimension) is in point here.*

118 This objection is subjective and is hard to weigh. However, full ownership of land as against the State is not the same thing as unlimited or irresponsible ownership. It is compatible with a sense of trusteeship or kaitiaki on behalf of future generations or towards the land itself. Ultimate State ownership (as at present) does not necessarily promote this sense. Equally, it can, as historically it sometimes did, support a philosophy of exploitation and development. As the quotation from Sir John Salmond (para 11, 2) shows, no one supposes that ownership of land can be absolute.

119 The notion of individual ownership is in line with Pakeha tradition, and the abolition of tenure today could hardly depreciate Maori land rights further. On the contrary, in emphasising that the ownership of Maori land would no longer legally derive from the Crown the proposals could enhance them. The proposals are consistent with Article 2 of the Treaty of Waitangi in that the Crown would no longer be legally interposed between the Maori and their lands. Indeed one could argue that for the Crown to hold the ultimate title to Maori land is not consistent with the recognition of tino rangatiratanga by the Maori version of the Treaty.

120 It has been suggested to us that some Maori, particularly older Maori, value the Crown grant or its equivalent as being a guarantee by the Queen of the security of their ownership of their land. No title issued by a State official could have this effect.

121 The fact is, however, that what the holder of Maori freehold land receives, and has received for generations, is a certificate of title under the Land Transfer Act, signed by the District Land Registrar: s 12 Land Transfer Act 1952. Crown grants as such have not been issued since at least 1885. Section 12 of the Land Transfer Act 1885 provided:

> From and after the coming into operation of this Act, no Crown grant shall be issued for any land subject to the provisions of this Act, but in lieu of such grant the Governor shall, by warrant under his hand, direct the Registrar to issue a Certificate of Title for such land ... and every such certificate ... shall have the force and effect of a Crown grant.

(And see the commentary to cl 7 of the draft scheme, at 47, where it is noted that new alienations by the Crown in fee simple are now made under s 116 of the Land Act.)

122 The certificate is signed by the District Land Registrar, and the warrant itself is filed in the Registrar's office for reference. Subsequent forms of certificate of title, as for instance when land is subdivided, read:

> THIS certificate, dated the day of , nineteen hundred and under the hand and seal of the District Land Registrar of the Land Registration District of , witnesseth that
> is seised of an estate in fee simple, subject to such reservations, restrictions, encumbrances, liens, and interests as are notified by memorial underwritten or endorsed hereon; subject also to any existing right of the Crown to take and lay off roads under the provisions of any Act of the Parliament of New Zealand, in the land hereinafter described, as the same is delineated by the plan hereon bordered , be the several admeasurements a little more or less, that is to say: All that parcel of land containing
>
> District Land Registrar
>
> (Land Transfer Act 1952, First Schedule, Form No 2)

123 (All land over which Maori (that is, customary) title has been extinguished since 1871 is subject to the provisions of the Land Transfer Act - in addition of course to land subsequently brought under that Act.)

124 *Second, the doctrines of tenure, in particular, and of estates, have created a logical and familiar jurisprudence of land ownership. Unless or until something was set in its place, an uncomfortable uncertainty might exist. What for instance would be the ultimate source of land ownership?*

125 One may doubt if the present principles of land law are familiar to many except lawyers, or are properly understood by laymen, or would be thought sensible if they were understood. A simpler and more rational approach, which did not impair existing rights, is its own justification.

126 As a matter of history the origin of particular land titles would of course continue to be a Crown grant or its equivalent. With Maori customary land that source is inapplicable. One might equally ask at present what is the ultimate source of ownership for Maori customary land. Legally the foundation of allodial ownership would be the registered title. The abolition of freehold tenure could thus be seen as the logical completion of the land transfer system.

127 *Third, it would infringe a basic Crown prerogative. The Crown's right to ultimate dominion over the land is a constitutionally fundamental doctrine.*

128 It is a prerogative without any necessity and without any significance. International law recognises a basic distinction between territorial sovereignty and the title to land. The former does not require the latter. All legal systems acknowledge the State's right to take land for sufficient public purposes and subject to compensation - the right of "eminent domain". This would not be affected by the proposals. Crown rights to dispose of and acquire land are closely regulated by statute (Land Act 1948, Public Works Act 1981), as they should be. The scheme envisages that the Crown will continue to own all land not owned by others.

129 *Fourth, it might impair the ability of the State to acquire land for public purposes, or regulate its use in the public interest. The need to do these things may arise as well from the duty of the Crown under international law or to carry out its obligations under the Treaty of Waitangi. Te ao Maori is relevant here also.*

130 It does not have any such effect. "Fee simple" is already indefeasible, and the holder of a fee simple estate is immune from competing claims, but the Crown (and Crown agencies and other parties defined by statute - see Part VII of the Resource Management Act 1991) can acquire land by statute (the Public Works Act 1981). Likewise the Crown may be able to take land under prerogative emergency powers which are, admittedly, limited in scope. (In its *Final Report on Emergencies*, NZLC R22, the Law Commission noted that the Queen's representative in New Zealand has powers in the time of emergency to requisition property needed for the defence of the realm; there is also the possibility that the

prerogative could be exercised to deal with a peacetime emergency, if that emergency was not covered by existing legislation.)

131 Likewise, the scheme would have no impact on planning or resource law, or limit the Crown's ability to fulfil its obligations under the Treaty of Waitangi. In modern times, ownership even in the full sense does not carry an unrestricted right to use. That is well understood even by people who presently believe that they are outright owners of their land. Countries with allodial ownership of land have planning legislation analogous with New Zealand's. Statutes regulating the use of land would continue to apply exactly as before. Moreover, the Crown's rights to minerals on land held by others are now, and ought to be, defined and governed by statute rather than flow from any doctrine of paramount ownership.

132 *Fifth, the terminology could be simplified and clarified without altering such long established doctrines as tenure and estates.*

133 This would mean using new and different language for the same thing. It would carry its own danger of confusion, and would simply be toying with the issue. To legislate only to change words is wasting the time of Parliament.

134 *Sixth, it would create legal confusion.*

135 No confusion should result. The proposal eliminates much obsolete terminology, which may be obscure even to some lawyers. And it restates the law more directly and more clearly. Land would be owned in much the same way as chattels have always been owned, and the law would be closer to what most people suppose it to be. But the substance of the law would be largely unchanged and existing rights, powers and obligations would not be affected.

136 There is a significant precedent here. Before 1874 in New Zealand the rules relating to succession to property on the death of the owner differed radically depending on whether the property was "real" or "personal" - approximately corresponding to interests in land and other property. A series of statutes ending with the Administration Amendment Act 1939 abolished the special rules governing succession to land, and provided a single code based on the rules that had applied to succession to personal property. There seems no reason why the same cannot be done for the substantive land law, recognising however that interests in land are inherently likely to be more complex than those relating to chattels.

## XV

## Conclusion

137 The examination that the Law Commission has made of the land law of New Zealand and other countries, and its effects, has persuaded it that there would be advantages in converting present estates in fee simple into allodial ownership, and

making consequential changes. It considers that the objections that can be offered to doing this can be answered, and that the necessary legislation could be incorporated without great difficulty in an existing statute, particularly if a new Property Law Act is enacted as the Law Commission has recommended. The review now being made of the Land Transfer Act provides a unique opportunity to do away with feudal elements that survive in our land law. The Law Commission is therefore inclined to favour change.

138 The proposals in this paper break such new ground in New Zealand (and nothing similar has been done in Australia, Canada or England) that we are particularly anxious to obtain comments on the scheme, or on any aspect of it, and to hear from anyone who considers that the arguments in support of change are fallacious.

## APPENDIX A

REFORM OF TENURES - OUTLINE OF SCHEME

CONTENTS

[D R A F T]

## REFORM OF TENURES - OUTLINE OF SCHEME

**1 Land described**

**For the purposes of this scheme, land includes the space above any land and all waters, watercourses, plantations, gardens, mines, minerals and quarries, and all trees and timber that are thereon or thereunder.**

## COMMENTARY

### Clause 1

For practical reasons it is important to align the description of land for the purposes of the scheme with the definition in the Land Transfer Act. For example, land transfer titles can be and have been issued for minerals or specific minerals under land, leaving the surface and everything else below and above the surface in separate "ownership". But the existing Land Transfer Act definition is in part inappropriate and inconsistent with the object of the scheme. It reads:

> "Land" includes messuages, tenements, and hereditaments, corporeal and incorporeal, of every kind and description, and every estate or interest therein, together with all paths, passages, ways, waters, watercourses, liberties, easements, and privileges thereunto appertaining, plantations, gardens, mines, minerals, and quarries, and all trees and timber thereon or thereunder lying or being, unless specially excepted.

Parts of this are repetitive, eg an "interest in land" includes an easement, which is separately listed. And "hereditaments" are all interests in land. On the other hand, it fails to mention the airspace above the surface, although the advent of unit and stratum titles makes this of growing importance. (A recent decision of Anderson J, *Disher v Farnsworth* (Unrep, High Court, Tauranga, CP 72/89, 3 October 1990) found that the area above a unit title was not common property of the unit title owners; if this conclusion is correct it highlights the existence of a difficulty with the Unit Titles Act which makes no provision, express or implied, for air space.)

The scheme does away with the terminology of "estates"; the definition should therefore not refer to them. And to perpetuate terms such as messuages, tenements and corporeal and incorporeal hereditaments is alien to the scheme's policy as well as being unnecessary.

It is a question whether "land" should be defined to include all interests in land. This is a common drafting practice. However the scheme deliberately distinguishes the ownership of land, and of certain lesser interests in land. To say initially that whenever the scheme uses the term "land" it embraces every interest in land may at best be confusing. Nor does it seem necessary. Clauses 10 and 11, for instance, refer specifically to "land, and any interest in land". The definition clause therefore makes no reference to interests in land.

**2 Fee simple to become allodial ownership**

**(1) Every person who at the commencement of the scheme is seized of a freehold estate in fee simple in any land, whether or not that estate is absolute or is in possession and whether or not that land has been brought under the Land Transfer Act, shall become the allodial owner of that land subject to all then existing rights and encumbrances.**

**(2) Maori customary land, that is, land which at the commencement of the scheme, being vested in the Crown, is held by Maori or the descendants of Maori under the customs and usages of the Maori people, shall be owned allodially by the Crown but shall continue to be held by those persons under those customs and usages.**

## COMMENTARY

### Clause 2

This is the essence of the proposed reform, and almost everything else in the scheme is consequential on it.

The description of Maori customary land follows the definition in s 2 of the Maori Affairs Act 1953. The question of the scheme's application to Maori customary land is discussed in Part XII of the paper. Crown ownership of land under the scheme (see cl 6) would be subject to all existing rights and burdens, whatever they might be found to be. An owner of land under Maori custom would have the same right as now to prove title in the Maori Land Court and have a land transfer title issued to him or her: Maori Affairs Act, ss 161 - 168. Under the scheme that would then make him or her the allodial owner.

The clause is not limited to the holders of a fee simple estate **absolute** or **in possession**, because of the possibility of determinable fees (see comment on cl 3) and the need to deal with fee simple estates otherwise than in possession; see comment on cl 4.

The term "freehold" will disappear from the law if the scheme is adopted. Allodial ownership is greater ownership than "freehold". That is not to say that it may not continue in popular use as a synonym for allodial ownership or (inaccurately) to mean land owned free from any mortgage.

3 Conversion of estates

(1) Every person other than the Crown who at the commencement of this scheme

(a) holds a freehold estate in fee simple in any land becomes the allodial owner of that land;

(b) holds a freehold stratum estate in any land becomes the allodial owner of a stratum interest in respect of that land;

(c) holds an estate for life (including an estate for the life of another person) in any land becomes the owner of a life interest in that land;

(d) holds an estate as lessee or sublessee (including a leasehold stratum estate) in any land becomes the owner of a leasehold or subleasehold (or leasehold stratum) interest in that land, as the case may be.

(2) All references in any enactment or in any instrument (whether the enactment is made or the instrument executed before or after the commencement of the scheme) to an estate in land, or to an estate of any kind in land, or to the holder of any estate, shall be construed accordingly.

(3) After the commencement of this scheme, no estate in land may be granted or disposed of, and the effect of any such purported grant or disposition shall be to grant or dispose of the land, or the corresponding interest in land.

(4) All references in any enactment or in any instrument to tenure of any kind in relation to land shall be construed as a reference to ownership of the land or the corresponding interest in land (as the case may be).

## COMMENTARY

### Clause 3

The ownership of an estate in land may be divided in either time or space. Formerly the law recognised four different temporal estates:

(a) fee simple
(b) fee tail
(c) life estate
(d) leasehold estate.

The first three were freehold estates. The fee tail has been abolished in New Zealand; the others remain. Legal life estates are unusual but by no means unknown. Equitable life estates (ie, behind a trust) are common. They may arise under wills or lifetime settlements. A life estate may also arise, it would appear, from the grant of a lease for the lessee's life and is registrable by virtue of s 115 of the Land Transfer Act.

A new form of estate, the stratum estate, was created by the Unit Titles Act 1972, principally to give fuller effect to the increasingly common desire for separate ownership of flats and offices in multistorey buildings. The stratum estate is a hybrid. It may be a freehold or leasehold estate. As a freehold estate it consists of a fee simple estate in the unit comprising the flat or office, and a share in the fee simple estate in the common property (such as access ways and the land itself on which the building stands) and in other units to which the proprietor of the unit is contingently entitled: s 4(2).

A stratum estate may be dealt with (eg, by sale, lease, mortgage or settlement) as if it were a fee simple estate. The scheme needs to provide for this form of ownership.

Determinable fees should not pose problems and may not need to be mentioned expressly. It is not certain whether this species of beast is extinct, or still in practice to be found in New Zealand (we know of none)[19] but a stratum estate under the Unit Titles Act 1972 is at least analogous to a determinable fee. Sections 45, 47 and 48 of that Act deal with the situation where the building in respect of which a stratum estate has been created is destroyed or is to be demolished. In that case the estate in the unit concerned is determined: s 4(2)(a). The owner of the estate will become the allodial owner in accordance with the scheme, but that ownership may be divested on the occurrence of some future event. The documents will show who is then the owner.

There is also apparently the possibility of conditional fees. According to Gray, *Elements of Land Law*, determinable and conditional fees are notoriously difficult to distinguish, and the distinction was said judicially in 1893 to be "little short of disgraceful to our jurisprudence" (73). If necessary they could perhaps be deemed to be determinable fees for the scheme's purposes, but, as we have said, we believe there is no need to mention either.

Subclause (1) is a straightforward conversion exercise, in part giving detailed effect to cl 2, and in part restating existing estates in land in terms of interests. Under cl 5 all the substantive law governing life and leasehold estates is applied to the corresponding interests.

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19 In England statutory determinable fees are apparently quite common where land comes into the hands of a public authority for particular purposes, eg, a road.

Subclauses (2) and (3) are important to round off the scheme. If, for instance, the Crown transfers land after the scheme is in operation other than by way of lease, the transferee is to acquire allodial ownership. Moreover, it is not intended that those who will under the scheme have allodial ownership should be able to "infeudate", that is to create "estates" in that land analogous to those that are now held from the Crown. In other words, the abolition of freehold tenure and the conversion of estates to interests will have effect for the future as well and will apply to citizens as well as to the Crown.

The scheme does not require, or envisage, that the term "leasehold" will fall into disuse. "Leasehold" is a well-known and commonly used term which describes a lessee's interest and land which is the subject of a lease.

**4 Rules for special cases**

**(1) For the purposes of the conversion to occur under clause 3, where before the commencement of this scheme the holder of an estate in fee simple (the grantor)**

**(a) has granted a life estate with reversion to the grantor, the grantor is deemed to be the holder of an estate in fee simple in the land, subject to the life estate.**

**(b) has granted a life estate to any person with remainder to any other person, and at the commencement of the scheme the remainder is vested, the person in whom the remainder is vested is deemed to be the holder of an estate in fee simple in the land, subject to the life estate.**

**(c) has granted a life estate to any person with remainder to any other person, and at the commencement of the scheme the remainder is contingent, the grantor is deemed to be the holder of an estate in fee simple in the land pending vesting of the remainder, subject to the life estate.**

**(2) These rules apply after the commencement of this scheme to the allodial owner of land and to the grant of a life interest as they apply to the holder of an estate in fee simple and to the grant of a life estate.**

**(3) A lease may be granted after the commencement of this scheme for the life of the lessee or of any other person, and shall create a leasehold interest, subject to the terms and conditions of the lease, and not a life interest.**

**(4) Nothing in subclause (3) affects the validity and effect of any lease for life granted before the commencement of this scheme.**

## COMMENTARY

### Clause 4

This clause has the aim of clarifying the law in the special cases of life estates followed by reversions or remainders, and of leases for life.

**Example 1**
A (a fee simple owner) transfers his land to B for life without doing more. In that case A has what is technically called a **reversion**. The land goes to him or his successors on B's death, and there seems little doubt that even during B's life A retains a fee simple estate subject to B's life estate. So under the scheme A will be the allodial owner.

**Example 2**
A transfers the land to B for life with **remainder** to C, who is alive at the date of the transaction. In that case A has divested himself completely of his interest in the land. C is said to have a **vested remainder**, and appears to be the fee simple owner subject to A's life interest.

**Example 3**
The remainder is given to such of C's children as are living at B's death. These children may or may not have been born. Their remainder is **contingent**. It appears that the grantor continues to own the fee simple in the meantime but this is not certain (see discussion at para 91).

**Example 4**
Instead of transferring a life interest directly, A grants B a lease for B's life under s 115 of the Land Transfer Act. On New Zealand authority (at para 91) B has not a leasehold but a freehold interest for his or her life. The paper mentions some of the practical uncertainties that this gives rise to.

Section 95 of the Land Transfer Act presents a further complication and may require some amendment if legislation along the lines of the scheme is enacted. It reads:

> (1) The registered proprietor of land under this Act may create or execute any powers of appointment, or limit any estates, whether by remainder or in reversion or by way of executory limitation, and whether contingent or otherwise, and for that purpose may modify or alter any form of transfer hereby prescribed.
>
> (2) In case of the limitation of successive interests as aforesaid the Registrar shall cancel the grant or certificate evidencing the title of the transferor, and shall issue a certificate in the name of the person entitled to the freehold estate in possession for such estate as he is entitled to, and the persons successively entitled in reversion or remainder or by way of executory limitation shall be entitled to be registered by virtue of the limitations in their favour in that instrument expressed, and each such person upon his estate becoming vested in possession shall be entitled to a certificate of title for the same.

The problem is that where life estates followed by remainders or reversions are created the District Land Registrar is required to cancel the fee simple title. New titles are to be issued to those entitled to these subsequent interests only upon their estate becoming vested in possession. This does not fit well with the concept of a

continuing allodial ownership to which a life interest and any other intermediate interests are subordinate. Indeed it could be argued that the present law itself, whereby the fee simple continues in existence in these circumstances, is not properly reflected in s 95. (And except in respect of leases for life it is the intention of the scheme to do no more than transpose existing rules to the new vocabulary of ownership and interests, clarifying the law where necessary.)

The effect of subcl 3 is that for the future a lease for life will operate as a lease in the same way as, for instance, a lease for 99 years now does. At present a lease for life creates a freehold life estate.

Sublause (4) ensures that the status of existing leases for life will continue. They amount to freehold life estates, which the scheme would convert into life interests. The rights and obligations of these lessees (and their lessors) will therefore not change.

**5 Application of existing rules**

**(1) All enactments and rules of law that apply to life estates and to leasehold estates in any land (including estates by way of sublease), and to the powers, rights and duties of life tenants, lessors and lessees, and sublessors and sublessees, continue to apply to life interests and leasehold and subleasehold interests respectively, and to the powers, rights and duties of the owners of life and leasehold (including subleasehold) interests under the scheme.**

**(2) Nothing in this scheme alters or affects any remedies of any person in relation to any land, or any interest in land.**

**6 Crown owns residual land**

**All land in New Zealand which is not held at the commencement of this scheme by any other person in fee simple shall thereafter be owned allodially by the Crown, subject to all then existing rights and encumbrances.**

## COMMENTARY

### Clause 5

The purpose of this clause is to make it clear that the replacement of the term "estates" by the term "interests" has no effect on substantive rights and remedies. Thus, for example, the owner of a life interest will still be liable for waste to the extent that he or she now is, and lessors and lessees will still have their existing rights of action for recovery of possession.

### Clause 6

It seems a basic principle - and it is certainly a requirement of convenience - that all land should have an owner. The common law theory accommodated this by making the Crown the ultimate owner of all land. The scheme instead makes the Crown the owner of all land that no one else owns. As to Maori customary land see Part XII and comment on cl 2.

The need is to ensure that (a) all allodial land has an owner and (b) no land passes to the Crown under the scheme by default - because, for example, there is no fee simple owner presently in possession - while safeguarding existing substantive rights from change.

The broad words "in fee simple" are not limited and mean what they say. The fee simple may be determinable (if there are determinable fees in New Zealand), or it may not be "in possession". It is still a fee simple to which the clause applies.

**7 Crown may transfer land**

**The Crown shall not grant any estate in land after the commencement of this scheme, but the Crown may, pursuant and subject to any enactment, transfer its allodial ownership or grant a lesser interest in any land that it owns to any other person in the same manner as that land or interest may be transferred or granted by any person other than the Crown.**

## COMMENTARY

### Clause 7

The concept of the Crown grant is rooted in tenure, and at least arguably impossible to sustain in its absence. It is in the nature of a disposition (nowadays unconditional apart from the payment of purchase price) by a superior of a part - never the whole - of the superior's rights. So there seems no reason why the Crown grant should survive the abolition of tenure. Such grants since 1885 have taken the form of the issue of a certificate of title under the Land Transfer Act. Where the Crown does dispose of land to private individuals under the necessary statutory authority the process is governed by s 116 of the Land Act 1948. In essence, the person who purchases or acquires the fee simple is, on completion of payment, entitled to a certificate of title in respect of the land. According to s 116(7), the procedure set out in the section may be used in lieu of a Crown grant.

But there is also s 12 of the Land Transfer Act 1952, which enables the Governor General, by warrant under his or her hand, to direct the Registrar to issue a certificate of title in Form No 1 in the First Schedule to the Land Transfer Act. However, new alienations by the Crown in fee simple are now made under s 116, and a certificate is given by the Commissioner of Crown Lands and the Chief Surveyor, which has the same effect as a warrant under the hand of the Governor-General. (Hinde McMorland & Sim *Land Law*, Vol 1, para 2.024)

Under the scheme the Crown will not grant any estate in land but will transfer its ownership, or grant some interest less than ownership (notably leases). Since the Crown's ownership will be of the same nature as the citizen's, the normal modes of transfer should be exclusive.

It is an administrative rather than a legal complication that Crown land generally (in contrast to the situation in England) has never been "brought under" the land transfer system and no certificate of title exists for it. Section 116 may need some adaptation for the purposes of the scheme. Even now it seems inappropriate where a certificate of title already exists for Crown owned land. However, it does not affect the nature of the transaction - the Crown would simply be transferring its allodial ownership to the new owner.

**8 Crown may take land under statute**

**Nothing in this scheme limits or affects any right of the Crown to take or acquire land pursuant to any enactment, but the Crown shall have no power, except pursuant to an enactment or by agreement, to acquire any land or interest in land. This shall not affect any right which the Crown has at law to requisition land in time of war.**

**Clause 8**

All legal systems recognise what is often called the right of eminent domain - the State's right to take land from the citizen, even by compulsion, for public purposes seen as sufficiently important and, where the rule of law prevails, subject to proper compensation. This right is not dependant upon the doctrine of tenure and its retention is essential.

However, it is uncertain whether or not the Crown's prerogative right at common law to take land in certain circumstances has been superseded by statutory provision - in particular those in Part II of the Public Works Act 1981 and its predecessors. That Act empowers the Crown (and local bodies) to acquire land by purchase or compulsion, and provides procedures for doing so and machinery for determining objections. These processes, which are aimed at protecting the rights of individuals, are not available if the Crown takes land by prerogative power. Accordingly (though it is not an essential of the scheme) the clause proposes to make it clear that there is no separate power to acquire land under the royal prerogative except in time of war.

9 Escheat abolished

(1) The rule of law known as the doctrine of escheat is abolished, but where land would have reverted to the Crown by way of escheat, it vests in the Crown as unowned land, subject to all other existing rights and encumbrances.

(2) Where under any enactment or rule of law a person

(a) validly disclaims any land to which he or she is entitled as allodial owner, that land vests in the Crown subject to all other existing rights and encumbrances;

(b) validly disclaims any life interest, that interest reverts to the allodial owner subject to all other existing rights and encumbrances;

(c) validly disclaims any lease or sublease, the lease or sublease reverts to the lessor, or, as the case may be, to the lessee subject to all other existing rights and encumbrances.

10 Co-ownership

Land, and any interest in land, may be owned jointly or in common, and every enactment and rule of law which relates to joint tenants and tenants in common shall relate according to its tenor to joint and common owners.

## COMMENTARY

### Clause 9

The Administration Amendment Act 1944 abolished "escheat for want of heirs or successors", but *Re van Enckevort (a bankrupt)* (1990) 1 NZ Conv C 190,589 and *Re David James & Co Ltd (in Liquidation)* [1991] 1 NZLR 219 show that the doctrine remains in at least two residual cases. Subclause (1) replaces escheat in all cases with a statutory vesting in the Crown.

Note Rural Bank J. OA.

Subclause (2) deals particularly with disclaimed land, which was the subject matter of the two above decisions. It may exhaust the remaining possibilities of land escheating but subcl ( 1) would in any event remove any doubt. Subcl (2) is not limited to allodial ownership. It would seem that upon disclaimer a life interest would revert to the allodial owner, and a lease would revert to the lessor. It is useful to say this expressly, and paras (b) and (c) do so.

### Clause 10

This is a straightforward adaptation of terminology to accord with the scheme.

**11 Land transferable**

**Subject to any enactment, land, and every interest in land, is transferable without the permission of the Crown or the need to make any payment to the Crown.**

**12 Future interests may be created**

**Land may be transferred, and any interest in land may be created or transferred, to take effect at any future date, or upon the occurrence of any future event, within the limits of the rule against perpetuities as modified by the Perpetuities Act 1964.**

## COMMENTARY

### Clause 11

This is based on the Law Commission's proposals for the replacement of the statute Quia Emptores. (NZLC PP16 para 131) The reference to permission of and payment to the Crown is perhaps unnecessary. The need to negative any requirement of Crown permission for transfer of an estate, or of payment to the Crown, arose from the original feudal ambience of the law, and the fact that land was held in fee from the Crown. If land is allodially owned, all this is irrelevant.

### Clause 12

This also follows the Law Commission's proposals for a new Property Law Act, which can be found in NZLC PP 16, para 157.

**13 Equitable rights unaffected**

**Nothing in this scheme affects any power of a court exercising equitable jurisdiction to enforce rights and interests in land, or give any remedies for the infringement of such rights and interests, except so far as may be required to give effect to the provisions of this scheme.**

**14 Land Transfer Act unaffected**

**Nothing in this scheme limits or affects the provisions of the Land Transfer Act 1952, except as specifically provided.**

## COMMENTARY

### Clause 13

It is not the purpose of the scheme to affect equitable rights and interests or to diminish any powers of a court exercising equitable jurisdiction. But "equity follows the law" and the terminology at least will have to alter. To the extent that tenure and legal estates disappear it would be confusing and anomalous for them to remain in equity. The courts are well able to deal with this appropriately, particularly given the general indication in this clause.

The language of the clause is based on a concept of equity as a system of remedies and of enforcing certain interests, rather than as a body of substantive law.

### Clause 14

It will be necessary to make allowance for the scheme in specific provisions. However, they have yet to be identified. The definition of "land", and s 95, may be two of them. At least certificates of title issued subsequently must reflect the new terminology. And it will need to be made clear that certificates of title may continue to be issued for lesser interests than full ownership, eg life interests, leasehold interests, and ownership in common.

**15 Maori customary land unaffected**

**Nothing in this scheme applies to or affects Maori customary land except insofar as the scheme expressly so provides.**

**16 Repeals**

**[The scope of these will depend on what changes have been made to the Property Law Act consequent on the Law Commission's Preliminary Paper 16.]**

**17 Consequential amendments**

**Acts likely to require amendment include**

**Crown Grants Act**
**Joint Family Homes Act**
**Land Act**
**Land Transfer Act**
**Maori Affairs Act**
**Property Law Act**
**Unit Titles Act**

## COMMENTARY

### Clause 15

This clause can stand whatever is decided about the status of Maori customary land: see Part XII. Various amendments will be needed to the Maori Affairs Act 1953, the exact nature of which will depend on that decision. But, for example, if the Maori Land Court determines the title to any customary land, and a land transfer title is issued, it will not be held as an estate but owned as allodial land. Moreover, "Maori land" now held by way of a freehold estate in fee simple will, like other land, become allodial land owned by the present proprietors of the estate.

In any event the scheme will otherwise preserve Maori land as a separate category with its own body of law.

### Clause 17

A few of the possible changes have been indicated in the comments above and in the main paper.

## APPENDIX B

## GLOSSARY

Some of the terms used in the paper are defined below. The terms derive from the law of England. Their relevance to the law of New Zealand stems from the introduction of the English system of land tenure (or means by which land is held) when New Zealand became a British colony. However, the system of land tenure in New Zealand was an adaptation of the English law. The terms have therefore been defined in terms of their relevance to New Zealand law.

The glossary is prefaced by three classifications which explain how the terms are ordered in the dictionary.

### A. The English feudal structure

Land ownership conferred status in the feudal system.

- All land was owned by *the Crown* (*the overlord, the lord paramount*)
- The Crown granted land to its *tenants in chief*
- The tenant in chief granted land to subsequent *tenants* who could in turn effect subsequent grants, with the last in line of the subsequent tenants being known as the *tenant in demesne.*
- Each of the tenants in possession between the tenant in chief and the tenant in demesne were known as *mesne lords.*

### B. Doctrine of tenure

The two important types of tenure recognised at law were:

Free tenures; and
Unfree tenures

There were different types of free tenures. They were the tenure in chivalry, the tenure in socage, and the spiritual tenure. The tenure in chivalry was subject to "incidents", conditions or obligations with which the tenant had to comply. The incidents were military service, aids, homage, escheat, wardship and marriage, forfeiture, relief, and primer seisin. The tenure in socage was subject to all the incidents of the tenure in chivalry except homage, military service and wardship and marriage.

The major unfree tenure was villeinage, which later became known as copyhold.

### C. Doctrine of estates

The different categories of estate represented the different periods for which land might be held. The two types of estate were "freehold" and "leasehold". Each type of estate consisted of sub-categories.

| | |
|---|---|
| Freehold estates: | fee simple<br>fee tail<br>life estate (including a life estate *pur autre vie*) |
| Leasehold estates: | fixed term of duration<br>term with duration capable of being rendered certain |

The terms defined below are ordered, first, with reference to the doctrine of tenure, and second, with reference to the doctrine of estates.

*doctrine of tenure*

copyhold — one of the unfree tenures was villeinage,which later became known as copyhold. This unfree tenure, the tenure of common labourers, saw the tenant in possession on behalf of the mesne lord, and obliged to perform certain services for the mesne lord. The term "copyhold" derived from the peculiar way in which the land was transferred. It was abolished in England in 1926 and has never existed in New Zealand.

escheat — A doctrine of law under which a fee simple estate in land reverted to the Crown (or in feudal times the mesne lord) if the person holding the estate died without heirs. Escheat for want of heirs and successors was abolished in New Zealand in 1944. Nonetheless, where a person dies intestate and without any successors as defined in the Administration Act 1969, his or her land and other property goes to the Crown as bona vacantia (unowned goods). And the court has decided (*Re van Enckevort* (1990) 1 NZ Conv C 190,589) that a form of escheat still exists when the Official Assignee disclaims certain property on bankruptcy.

freehold — the term came to be used in substitution for *socage*, when used in the sense of classification of tenure; however the term can also be used to describe the nature of an estate, and it is in this sense that it is most frequently used in current New Zealand law. The term is now used interchangeably with the term "fee simple", although in popular usage it can have a different and legally inaccurate meaning: land that is not subject to any mortgage.

socage — The tenure in socage is, according to Megarry and Wade (at 18), defined by what it is not, rather than what it is. The services incidental to socage tenure (which had been generally some agricultural service fixed both as to nature and amount) had by the end of the 15th century been commuted for money payments, which were often described as *quit rents*. The name by which socage tenure is usually now known is freehold tenure - the only surviving category of tenure (other than leasehold) in both England and New Zealand.

*doctrine of estates*

| | |
|---|---|
| estate | the word derives from the word *status*. It refers to the period of time for which land could be held, whatever the tenure. The difference in the way the estate is described refers to the different period of time for which the estate is held. |
| life estate | the term of the estate was the life of either the tenant or some other person named by the grantor. Section 95 of the Land Transfer Act governs creation of a life estate by transfer. A new certificate of title issues for the life estate so created. |
| fee simple | originally the estate which endured for so long as the original tenant or any of the heirs of the original tenant survived. However, the tenant could alienate the land and the fee simple survived while the new tenant had heirs, thereby making the estate potentially perpetual. Under Part III of the Administration Act 1969, an estate in fee simple lasts until the owner of the estate dies intestate without successors. (Hinde, McMorland and Sim, Vol 1, para 1.029) |
| fee tail | the estate lasted for the time during which either the original tenant or any of the lineal descendants of the original tenant survived. Section 16 of the Property Law Act 1952 has abolished the estate in fee tail in New Zealand. |
| seisin | the term denotes a particular kind of "quiet possession of land" and is one of the features distinguishing freehold estates from leasehold estates, because seisin applied only in respect of freehold estates. The term reflected the historical differences between the two main types of tenure and estates. A person was seised of land if he or she held a freehold estate in land of freehold tenure, and either had physical possession of the land or had created a leasehold or copyhold estate. Some one always had to be seised of particular land. The term is no longer relevant because the distinctions which gave it its peculiar meaning no longer exist. |

*other terms*

| | |
|---|---|
| bookland | An Anglo-Saxon term denoting land which was the subject of gift by book or charter, and governed by the notion not of dominium and tenure but of property. Bookland was, however, under protection - notably, of the king, but also of others including the church - and a holder of land by book could nullify challenge to the rights in the land by simple production of the charter. The other, more common, form of property at this stage of English law was folkland, which was of similar, absolute status but by contrast vulnerable to conflicting claims. (Joliffe, 72-74) |
| customary title | also described as aboriginal or indigenous title. A form of burden upon the legal title to land, but binding all land ownership *ab initio*. The concept has not yet been defined by the courts in order to identify the consequences (if any) for successors in title to the Crown. |
| hereditament | inheritable rights in real property, as opposed to inheritable rights in personal property. |

| | |
|---|---|
| corporeal hereditament | the physical objects comprising real property, ie land, including buildings and other fixtures, over which ownership is exercised. But an estate in land is a corporeal hereditament although it is an abstraction. |
| incorporeal hereditament | rights in relation to real property, rather than things, eg, easements, profits and rentcharges. The rights which are classified as incorporeal hereditaments are not logically identifiable but are the consequence of historical developments. Rent charges are incorporeal hereditaments, as are easements and profits. |
| personal property | all forms of property other than land. |
| real property | land and the things that are attached to land, rights in land which are heritable or enduring for life. A lease is not real property, however, being an exception because of the way in which the form developed outside the feudal system of landholding by tenure. A lease is a hybrid: a chattel real. |
| Udal law | the system of law which has prevailed in Orkney and Shetland since the 9th century. Ownership of land was comprised in a hereditary estate held absolutely but requiring a payment. |
| usufruct | the term derives from Roman law, and refers to the right to use the property of another. A usufructuary would, during possession, be obliged to perform the obligations of ownership, by, for example, paying outgoings. |

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