# Property Rights, Sustainability and Public Choice

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Sustainability implies a non-degrading use of natural resources in the long term. Property systems, on the other hand, institutionalise existing resource use practices in a fixed timeframe. Where outcomes such as third party effects have not been anticipated, property systems need to be modified or attenuated. The use of pastoral lease land in New Zealand exhibits these features and some attenuation is therefore desirable in new legislation. This paper reports a personal attempt to achieve these ends through bureaucratic reform and personal representation.

## 1. Introduction

Pastoral lease land is common in the South Island of New Zealand and is confined to higher land remote from the coast that was originally covered in tussock sp. before settlement or had been modified by fire and human intervention in much earlier human occupations. It is generally used for extensive sheep farming. In the 1840s temporary grazing licenses were issued to the graziers and these were later consolidated into pastoral leaseholds as the pattern of land use became clear.

Some 341 Crown pastoral leases cover 2.45m ha, approximately 48 per cent of the South Island high country, 20 per cent of the South Island's area, and 10 per cent of New Zealand's total area. These are large blocks of land; averaging 17240 acres or 7200ha.

The present system derives from the 1948 Land Act which created pastoral land leases from the previous non-freeholdable grazing leases issued from 1858. The creation of a separate category of tenure and a new form of lease with no right of freeholding and the retention of crown control over land use was considered to be justified on soil conservation grounds (CCL 1994). The rights of lessees and the lessor are clearly spelt out and cover most issues likely to be contentious. More recent reviews of the tenure system were mostly concerned with the introduction of some freeholding where it was suitable, and currently a Bill is before Parliament to introduce a systematic division between land that is suitable for private occupation and that which should be passed to the conservation estate (Crown Pastoral Land Bill).

As noted above Parliament was not unaware of soil conservation problems in the 1940s, but it seems that the situation has deteriorated in the intervening years. An official report (Ministers of Conservation, Agriculture and Environment 1994) presents a sombre picture of the present state of the vegetation in the area concerned particularly identifying the *long-term degradation* of the surface cover. There is a permanent transfer of nutrients out of the area and a host of biological and weed problems which are difficult to overcome. The report makes a case for ecological sustainability based on protection of the soils, maintaining the vegetative cover, maintaining the diversity of plant communities, and minimising the enrichment and contamination of water. These views are consistent with the aims and objectives of the Resource Management Act 1991.

The Crown Pastoral Land Bill makes provision for some freeholding of the existing pastoral estate. It accepts the sustainable management of the reviewable land in its objects and provides for management reviews to determine land that should be restored to full Crown ownership and that which should be available for freehold on a case by case basis. The land to be retained should be characterised by high inherent values which is further interpreted as covering any land including its natural resources (within the meaning of the Conservation Act 1987) and its recreational, cultural and historical values. The Commissioner of Lands may propose that any land be disposed of unconditionally or make disposal subject to two protective mechanisms i) maintaining public access to/or enjoyment of the land, and/or ii) the sustainable management of the land. The Commissioner has powers to discontinue a review when requested, and the lessee may accept or reject a proposal put up by the Commissioner.

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In terms of property rights the proposal separates off the land where semi-private property rights will prevail and removes the land which is seen to be at ecological threat from such a change. The proposal in effect carries on the *raison d'etre* behind the 1948 Act that the private individual is the best person to care for the long term sustainability of land which does not have high inherent values. What the proposal ignores is that many of the problems causing deterioration of the surface cover are not controlled adequately by private agents as one person's actions are very likely to affect others. In short, rabbit control, weed control, water contamination and soil erosion all involve effects on or the actions of others and no plan is likely to succeed without their amelioration. The proposed legislation needs to be amended to include a provision covering these possibilities in the protective mechanisms on land for disposal (clause 24(2)).

## 2. Existing Tenure

'Crown land' means land vested in the Crown which is not for the time being set aside for any public purpose or held by any person in fee simple. 'Pastoral land' means Crown land that is so classified by the Commissioner of Crown Lands under section 51 of the Land Act 1948. This defines pastoral land as 'land that is suitable or adaptable primarily for pastoral purposes only'. 'Pastoral lease' means a lease of pastoral land granted under Section 66 of the Land Act 1948. 'Pastoral occupation licence' means a licence to occupy pastoral land granted under Section 66A of the Land Act 1948 (CCL 1994).

Pastoral leases and licences do not contain a right to acquire the fee simple (i.e. to freehold). Pastoral leases are issued for 33 years with a perpetual right of renewal. Pastoral occupation licences may be issued for a period not exceeding 21 years and have no right of renewal. (There are only a few such licences still in existence and the intention is to phase these out as they expire (CCL 1994)).

Pastoral leases have both a contractual and a statutory basis. A lease constitutes a contractual agreement between the Crown as lessor and the lessee. Pastoral lease contracts specify the Land Act 1948 as the 'operative statutory authority' for defining lessor and lessee rights and privileges. Pastoral leases are characterised by having the conditions of the lease written into the Land Act 1948.

The rights, interests and obligations of the lessees are characterised as follows (CCL 1994):

- Exclusive occupation and quiet enjoyment (public access is not available as of right);
- Perpetual rights of renewal;
- Exclusive rights of pasturage (subject to a stock limitation);
- Ownership of structural and development improvements;
- The right to compensation (if the land is resumed by the Crown);
- A fixed basis for rental;
- Discretionary consent concerning cultivation etc;
- Recreational user permits are permitted by the Act; and
- Use of timber is granted.

Lessees have an obligation under the Act to ensure that the land is farmed 'diligently and in a husbandlike manner', to keep waterways free from weeds and to clear the land of all noxious weeds (Section 99).

The rights, interests and obligations of the Crown are characterised as follows:

- Ownership of the land exclusive of improvements;
- The right to control land uses;
- The right to reclassify the land;
- Consent to the sale of a lease; and
- The right of resumption.

The Crown has an interest in production from, and the sustainable management of pastoral land, as it has on all forms of tenure. The Crown also has interests in pastoral leases which relate to the safeguarding of the public interest in such matters as nature conservation, access, recreation, landscape and historic values. Its ability to uphold these interests is constrained by the rights it has alienated (e.g. exclusive occupation and pasturage), in perpetuity, to the lessees (CCL 1994).

In these provisions we see the strong influence of the Torrens system of land registration (introduced from S Australia) where the rights of the individual were paramount but subject to the over-riding responsibility of the Crown. Land registration sought to define the exclusivity of individual ownership by making it registrable and thus highly negotiable without undue acrimony (Johnson 1992). As the above rights, interests and obligations make clear, even leasehold ownership carried with it exclusive rights to pasturage and timber. Cultivation, cropping, burning and forestry were subject to discretionary consents which could easily be obtained. The very strength of these rights gave the land holder almost complete control over *all land forming and caring activities* on a property. On flat land without rivers an individual may be able to act without affecting others, but in a world of rolling hills and plains, steeper mountains, and many rivers and streams (not to mention fleet-of-foot predators), *no man is an island,* and land disturbance is impossible without affecting others. It is this fact that Surveyor Torrens and subsequent land administrators in both Australia and New Zealand overlooked in making land ownership so exclusive; the very exclusivity of the Torrens system made it unsuitable for cross boundary administration of environmental effects or externalities.

It is possible that individual responsibility could have lead to the control of rabbits and controls on excessive grazing. In fact, new weeds entered the picture, rabbits were not entirely kept at bay, and overgrazing became evident wherever these factors were present. It could be argued that complete closing up of the high country would reduce ecological damage to the minimum, but that policy would still leave open the questions of who would control predators, who would manage water resources, and who would take responsibility for long-term soil erosion? Individual responsibility still lies at the centre of the Crown Pastoral Land Bill, although the proposal is to try and separate off the more vulnerable land, and hope that individuals will care properly for 'reviewable land capable of productive use'.

## 3. The Threat to the Land Estate

The report of the South Island High Country Review committee (1994) is an up-to-date and authoritative statement on the threats to the high country estate.

'It is not yet possible to make definitive statements about the impacts of land use on all of the soils of the high country. There is a wide variation in land types and further research will be required. However, there is enough evidence to lead us to informed judgements.

'We are deeply concerned about the historic and continuing impact of grazing (by domestic stock and rabbits) on the condition of the soils and vegetation of the pastoral high country. Burning has caused more rapid change, but is no longer commonly practised on the most vulnerable lands. Our most serious concerns relate to the likely risks of declining levels of soil organic matter, soil nutrients and, to a lessor extent, soil pH. If these parameters decline in the long-term, a productive ecosystem cannot endure.

'We are concerned that a decline in soil condition is very likely on the unimproved lands. These lands comprise approximately 80 per cent of the land area of the pastoral high country and receive no inputs. In the long-term, the pastoral use of extensive areas of the South Island high country is unlikely to be sustainable.

'Wind erosion is considered to be the main preventable cause of soil loss in the high country and there is evidence of severe wind erosion at specific sites. More extensive long-term soil losses have not been quantified, but where there is bare ground the potential for wind erosion of soils is high, especially if the soil is disturbed by animals.

'The importance of vegetation in sustaining the soil resource cannot be over-emphasised. Plant cover must be maintained, not just to retain the soil, but to maintain or improve soil organic matter and nutrient balance and to ensure the potential for diversity in species.

'*Hieracium* species are now abundant over a large area of the high country, predominantly on pastoral lands, and are having a serious impact on farming businesses through an associated reduction in forage supply. Where *hieracium* is a virtual monoculture, the lack of diversity could increase the vulnerability of the land. Further research will be required before the inter-action between *hieracium* and land management is adequately understood. However, current evidence suggests that if the pressures which have caused change in the grasslands of the high country are maintained, *hieracium* species will persist or continue to increase.

'The rabbit populations have been successfully reduced by the Rabbit and Land Management Programme. The programme has broadened the focus and

understanding of rabbit control. It has defined the land most at risk, raised technical standards of rabbit control and promoted landholder ownership of the rabbit problem. Rabbits remain an ongoing threat to sustainability in the semi-arid regions of the high country. There will always be a need for continued vigilance on these lands'

(Executive Summary: the Martin Report 1994)

In an otherwise excellent analysis of the soil and vegetative problems of the high country, the Review does not provide any discussion of water quality or contamination. Thus in addition to the local level and externality effects of soil and vegetative degradation must be added the impact of these factors on riverbed aggradation, water quality for downstream users, dam siltation, and downstream erosion. It is problematic what the short term effects of poor high country land management will be on these attributes but in the long-term the stabilisation of some or all of the high country will be required for this purpose alone. It is therefore all the more important to provide for the control of these effects from the beginning of any reform plan for the high country.

## 4. The Crown Pastoral Land Bill

There have been numerous attempts to introduce reforms to the high country land tenure system (these are summarised by the report of the Commissioner of Crown Lands 1994). Most of the suggested reforms have included some aspect of the separation principle for land responsibility. This has accorded with leaseholders wishes to consolidate their properties and to remove the last vestiges of crown control as well as accommodating various notions of 'retirement' or reservation of vulnerable land.

Part I of the Bill enacts with some modifications provisions equivalent to the Land Act 1948 relating to pastoral land. The most important modification is that it will not be possible to grant new pastoral leases except as a consequence of a subdivision of an existing pastoral lease. It is further specified that the Commissioner (of Lands) in giving discretionary consent to any action proposed by the leaseholder should have regard to the desirability of ensuring (so far is practicable) the protection of the inherent values (other than recreation values) of the land.

Part II sets out the conditions for tenure reviews and subsequent recommendations for freehold disposal of reviewable land. The objects of this part of the Bill are to *promote the sustainable management of reviewable land,* to facilitate i) the restoration to full crown ownership and control of reviewable land that has high inherent values; and ii) the freehold disposal of reviewable land capable of productive use; and iii) the creation of appropriate public rights of access to and enjoyment of reviewable land.

The Commissioner is empowered to undertake the necessary reviews. The Commissioner may, on the written invitation, or with the written agreement, of the holder or holders, cause to be undertaken a review of the tenure of all the land being held under a reviewable instrument. The Commissioner may at any time discontinue a review; and shall discontinue a review if asked in writing by the holder concerned.

The Commissioner may propose to designate any area of land as land to be disposed of to a holder unconditionally. Alternatively, he may make the disposal conditional on one or both of the following protective mechanisms (clause 24(2)):

- Public access to or enjoyment of the land; and/or
- The sustainable management of the land.

## 5. A Proposal

The essence of the case proposed here is that there is a mismatch between the property rights conveyed by the Lands Act 1948 and the Lands Transfer Act 1952, and the goals of the sustainability movement as embodied in the Resource Management Act 1991. While the rights to disturb the soil and graze livestock were prescribed by the Lands Act, there was no express recognition of the effects of the holder's action on third parties.

While noting the declining state of the pasturage and the effects on third parties (through water contamination, for example), the Martin Report does not express an opinion on this conflict. They do note that the ecological objectives they propose are consistent with the objectives of the Resource Management Act. Section 5 states that resources should be managed in a way that safeguards the life-supporting capacity of air, water, soil, and ecosystems. This is sometimes referred to as the bottom line requirement of the Act.

The Crown Pastoral Land Bill proposes freeholding of suitable land subject to two constraints, i) public access to the land, and ii) the sustainable management of the land. It seems doubtful to me that these covenants would achieve satisfactory control over external effects. Even if these covenants (or the spirit of them) were included in District Plans, there would be problems of monitoring and supervision. These problems were anticipated in the report of the Commissioner of Crown Lands (CCL 1994, p.38). He also suggested the inclusion in an amended Land Act of a clause to tag the freehold titles with a covenant at the time of disposal of the land. The covenants would be binding on both parties to any agreement (p.39). The Pastoral Land Bill adopts his proposal.

The implication of the present draft of the Bill is that the regional authorities concerned will formalise a greater 'district' plan for the high country and the regions affected by individual actions so that effect could be taken of all the effects of continued occupation of the high country. This follows a collective responsibility approach where all the individuals involved (both upstream and downstream) are potentially brought together and responsibility and costs are shared between them.

It seems to me that a more specific provision is needed where the contract between the Crown and the freeholder provides for any changes in practices that would have third party effects. I have therefore proposed to the Select Committee that Clause 24 be strengthened by the addition of another sub-clause which would read:

> 24(2) Subject to subsection 3 of this section, the Commissioner may propose to designate any area of land as land to be disposed of to the holder unconditionally, or subject to the creation of 1 or more protective mechanisms, each relating to either or both of the following matters:
>
> (a) Public access to the enjoyment of the land;
>
> (b) The sustainable management of the land; and
>
> (c) *Arrangements for the mitigation of the effects of the actions of the holders on others.*

This would add to the protective mechanisms the Commissioner of Lands must have regard to in designating any area of land for disposition to a landholder. Some re-phrasing of the main part of clause 24(2) would also be required.

## 6. Summary

The burden of my argument is that there is a mis-match between the granting of property rights in the new Bill and introducing higher standards of environmental protection in the high country grazing area of the South Island. Some argue the Resource Management Act has sufficient power to overcome the problem; my approach is that the contract between freeholder and the Crown should specifically provide for the matching of the two objectives.

In the past, not only were the property rights arrangements deficient, but also the administrative arrangements for the management of the leases left a lot to be desired. In turn, there was insufficient scientific evidence available to demonstrate the precise effects of where current grazing patterns were heading. Furthermore, reform of the 1948 Act was delayed for a long time as leaseholders and others argued about the precise effects of present management and arrangements for rabbit control. Indeed the State itself was deficient in withdrawing resources from the Rabbit Boards just when the problem was getting out of control. If the report of the South Island High Country Review committee is to be believed, we have run out of time to make the necessary corrections to land management and thus any strengthening of new legislation in this area needs to be quite specific as to the sustainability implications of continued occupation of the high country. This may be a shock compared with the past but it is consistent with the goals society has now set in the Resource Management Act 1991. It is also appropriate to remember that the reviews of tenure will be spaced out over a long period of time and hence will not be administratively effective for many years to come. Action needs to be taken to secure the contractual situation *and* district planning procedures.

## 7. Concluding Note

The author answered questions before the Select Committee on 21 February 1996. The proposition put forward did not seem to impress Members! At the time

of publication, the Bill has not been reported back to the House.

## References

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