Rethinking Property Rights in New Zealand

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SUMMARY

This paper discusses a selection of the land tenure and property rights issues confronting New Zealand now. New Zealanders have grown up with the ideals of a settled and secure property regime and a sense of racial harmony and personal equality, but this is being called into question by recent property rights developments.

Increasing demands for rural land for residential development, and the restructuring of rural leases have the potential to change the physical and legal landscape of New Zealand's open tussock high country. It has also stimulated a surge in property values, benefiting landowners but presenting a significant barrier to most lower income New Zealanders hoping to purchase property. Many New Zealanders feel that property ownership is an inherent right, but find that such a right cannot be taken for granted. Similarly, expectations of the public nature of much of this private property – for example, the right of access to rivers, lakes and mountains, is being called into question because of changes in tenure arrangements and new non-farming owners. Furthermore, the purchase of large blocks of land by foreign investors has aroused concern that New Zealanders are loosing control of their country.

Claims for the better recognition of customary rights for Maori in the foreshore and seabed have prompted the government and non-Maori to react to the perceived threat of exclusive possession by demanding the extinguishment of such rights. This has prompted national debate about the place of Maori, and of the Treaty of Waitangi, and of the nature of land rights in New Zealand.

It is my contention that much of this concern is misguided. Generally it is a sign of the times: New Zealand being exposed to global market forces, increasing population and environmental pressures. The legal system in New Zealand is robust and yet flexible enough to deal with these changes in property expectations. But the way New Zealanders view land and property will have to be reevaluated in light of the changes.

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1. INTRODUCTION

Over the last decade, there have been multiple drivers for change in the way New Zealanders view land, public rights and private property. The ideal of a liberal society where everyone has access to the economic, ecological, recreational, and spiritual attributes of land is looking increasingly fragile.

Land in New Zealand (combined with a favourable temperate climate, good soil, generally plenty of water, and a strong rural infrastructure) has enabled high productivity and the accumulation of personal and national wealth. The primary production sector has provided a very comfortable standard of living, the tourism sector has thrived on presenting diverse and dramatic landscapes to the world, the recreational sector has been able to use a very high proportion of the land as an adventure playground, and New Zealanders have felt a close affinity with the land.

This affinity is illustrated by a high level of land and home ownership amongst New Zealanders, a feeling that we are rural outdoorsy people (in spite of the fact that we are one of the most highly urbanised nations in the world), and by the concern that is expressed if ever any threats to the land are made.

While most New Zealand legislation appears to support improving access to land, reserving land for public use and for conservation, managing the land in a sustainable way, and also protecting private property rights, there are currently significant issues surrounding land management and rights in land that are causing concern.

2. DRIVERS FOR CHANGE

The Crown Pastoral Lands Act 1998 set up a tenure reform programme releasing leased productive Crown land to freehold owners and setting aside land with conservation values into the conservation estate. This has often been portrayed as the last massive land grab by the wealthy at the expense of the general public.

There is increasing demand for land with special scenic or location attributes; near the coast, around scenic lakes and rivers, and close to the mountains. This has lead to increasing rural subdivision, changing traditional rural landuses and transforming scenic wilderness areas into upmarket rural/residential landscapes.

There is a perception that foreign owners are swooping on our relatively cheap land. This is inflating property prices to the extent that many previously affordable holiday home locations are now priced well beyond what the average New Zealander can afford. The concern is that New Zealanders are loosing control of the land.

There is a recognition of the history of colonisation and the ways that Maori suffered almost total land loss to the detriment of their economic capacity and their health, culture, education and status in New Zealand. The process now unfolding in the law courts, at the administrative tribunals investigating the past and recommending compensatory packages, and by legislation, is a complicated balancing act between doing the right thing for all while protecting the varied values in land, including indigenous world views.

Recently claims have been made extending the areas of Maori customary rights beyond the dry land and out to sea. This is counteracted by the increasing demands by other New Zealanders for increased open and free access to and use of rivers, the foreshore and the seabed, and conversely by the growing demands for commercial property rights to offshore 'land' for aquaculture and mineral exploitation

All of these issues have provided tension and conflict between a multitude of interest groups, and have required New Zealanders to rethink their attitudes to land and property, the nature of customary rights, and the expectations of access to land. This paper will illustrate some of the themes about land and the community, in the context of a modern and increasingly globalised democracy and of increasing population and environmental pressure.

3. TENURE CHANGE AND LAND ALLOCATION IN THE SOUTH ISLAND OF NEW ZEALAND

Prior to British settlement of New Zealand, the South Island was the traditional home of the Maori iwi (tribe) Ngai Tahu. Ngai Tahu asserted jurisdiction over the whole of the lands, although their relatively small population meant that they were in actual occupation of only a small proportion of the land. Nevertheless, they knew all the land and covered all of it in their extensive travels to locate and use a variety of resources from the land. Their possession of all the land was acknowledged by the British government and guaranteed in the Treaty of Waitangi. They managed their lands for subsistence living but also gathered resources for trade – such as the valuable Pounamu (New Zealand nephrite jade). They made use of a variety of tools including fire for forest clearance. They had hunted some large bird species to extinction (including the huge flightless Moa). However their population was small and in other respects they stepped relatively lightly on the land. Much of the land was covered in bush – New Zealand's version of a forest of tall timber and thick undergrowth. Apart from the lack of any land mammals this bush supported a high level of biodiversity which supported Maori use.

After the arrival of European and American whalers, sealers, and missionaries in the early nineteenth century, New Zealand was settled predominantly by an agricultural society – settlers (predominantly English) being drawn to this relatively small group of islands by the promise of land.

The Treaty of Waitangi was signed in 1840 by the British representative in New Zealand and by most Maori chiefs. This Treaty granted the British rights of government over all New

Zealand in exchange for the recognition of Maori property rights. It also granted Maori all the rights and privileges of British citizenship – essentially equal rights for all.

The Crown negotiated the purchase of all the land of the South Island in several large purchase deals with Ngai Tahu. The transfer of land from Maori hands to Crown ownership was effected, but the contract terms were often not completed.

The British colonial authorities and the government installed in New Zealand were very keen to attract settlers from Britain and the promise of private ownership of land was a great incentive. An ethic of ownership was encouraged and the government encouraged clearance and development.

For much of the land, the government saw the future in small holdings with landowners working their land productively – encouraging not just a healthy lifestyle with a high work ethic, and full production to contribute to economic growth and a relatively evenly distributed population, but also good and appropriate land and resource management. Private ownership and personal investment in the land was expected to lead to optimum stewardship of the land.

The settlers generally saw the bush as a barrier to development and although much timber was extracted and used for construction, much was also wasted in clearance burning. In fact, the bush was little valued by the settlers whose vision for New Zealand was of clear green pastures supporting literally millions of sheep and cattle. New Zealand became a main supplier of meat, wool and other primary products to Britain. The government actively encouraged land clearance and assisted with funding the necessary rural infrastructure to support the pastoral and agricultural economy. Maori however were unable to take advantage of such assistance. The government wanted Maori off the land and somehow expected them to become civilised and enculturated as workers not as landowners. In fact the government and administrators of the day saw the communism of Maori land ownership as one of the biggest threats to the civilisation and (economic) development of New Zealand (Stokes 2002). Even when various commissions of enquiry suggested Maori were suffering because of landlessness (having no access to land), the government responded by offering only the poorest of land in relatively inaccessible areas, and providing no development assistance. Maori – 'the people of the land' – were presumed to be able to subsist, while white settlers were encouraged and supported to thrive.

4. HIGH COUNTRY TENURE REFORM

In the early days of land distribution most of the easily accessible low lands of NZ were sold by the Crown to individual farmers. However the Crown retained much of the high country of the South Island. This land was not suitable for arable farming, but was natural tussock country, able to support grazing sheep and cattle. The government leased out these lands in large blocks under pastoral lease legislation which limited land use to pastoral farming. The idea generally, was that the government maintained final authority on land use decisions. Erosion was a very real risk in these sparsely covered steep and shifting hillsides, and the ecology too fragile to hand over to private control. As it turned out, government control did

not prevent serious erosion and the management techniques (including tussock burning) have been controversial at least.

While the South Island pastoral lands were leased from Crown ownership, there was at least the pretence of public rights and access, and certainly the general public consensus is that it is public land. In fact a lease enables exclusive occupation (and other attributes of ownership, like sale and use) in almost exactly the same way as a freehold title – the land was essentially private. However there was a tradition of pastoral farmers prepared to accept low impact public passage on and through their lands to support the open space desires of the New Zealand public.

Economic and structural reforms of the 1980s saw the government shedding its many responsibilities of ownership, by selling state owned assets and separating out the profit-making sections of government from the service provision of government. This philosophy extended to the land. The government decided to sell off all productive lands and to only retain lands that needed special protection for conservation or heritage purposes. This new philosophy saw land use decisions better determined by resource management legislation rather than by tenure control.

In 1998 the Crown Pastoral Land Act was passed, which instituted a voluntary programme of reform of pastoral lease land. Under the Act, pastoral lease holders can negotiate with the Crown to freehold all productive land, to give up lease land with special ecological values, or land to be set aside for conservation into the Crown Estate, and in some cases to retain some land under a Crown lease to be managed by the freehold farmer but with ultimate Crown control over management.

The pastoral lease reform programme has produced varying reactions from a number of interested stakeholders. Several leaseholders have completed the process and the new freedoms of freehold title have enabled them to diversify away from pastoral farming. New land uses and new rural landscapes are springing up in what was once wide-open tussock grazing country. Forestry, tree crops (nuts, olives, fruit), and vineyards, new rural production buildings and planted shelterbelts, are all spreading over some of this land. Land parcels are being subdivided to fund the investment in new production infrastructure and parcels are sold off to investment owners who may often be absentee owners.

The tenure pattern is changing rapidly, production is diversifying, productivity is increasing, land prices are multiplying, and the landscapes are changing dramatically. Many of these effects are cause for concern to many New Zealanders. It may be progress or it may be the end of a way of life and an archetypal landscape which has been ingrained into many kiwi identities. There is concern that land that once produced a high proportion of New Zealand's sheep meat and fine wools, the staples of a previous NZ economy, is no longer fully productive and the traditional economic value of that land will be lost along with the rural infrastructure; the service towns schools and businesses which depended on that production.

Often the new land uses require huge investment in infrastructure (wineries, packing sheds, other production plant), but also additional inputs to production – most frequently, irrigation

water. This has dramatically increased the demands on our river water, and not being a low input land use, is essentially unsustainable.

The process has enabled the Crown to take more direct ownership and control of lands to be reserved for conservation, but it is by no means clear that even the land reserved for the Conservation Estate will be better off under this tenure. The Department of Conservation is spread thin in NZ. There are limited resources to actively manage the land to enhance the ecological values and it is an uncertain assumption that by merely locking land away from production, it will in any way enhance the ecological values. It is at least possible to assert that a private owner interested in maintaining his investment in the land will do a better job at protecting it. A private landowner may be more active in weed and pest control and in conservation planting. In addition, it is the private farmer who is on the spot and with hands-on experience with the particular local site. The local farmer takes on a stewardship role of land care while the Department of Conservation struggles to do much more that abandon the land to nature and wilderness.

New owners, new landuses, and new rural infrastructure (more noticeably commercial and active than pastoral farming), have caused concerns that the public of New Zealand will not have such open access to this open space in the future, now that any pretence of Crown control (and public rights) is lost. New Zealanders like to feel there are always the hills, mountains, rivers, lakes, coast and bush to retreat to. There is a strong desire to escape the urban environment and renew the spirit by contact with nature, a longing for a sense of the wilderness. Of course not much of New Zealand is true wilderness, untouched by human impact. Our open space invariably includes views interrupted by the more obvious features of human presence like housing, fences and planted crops.

The land is being used in different ways that are not always compatible with relatively open access, and owners are not so tolerant of trespasses. There are new issues at stake; security of infrastructure and production plant, health and safety and owner responsibility concerns, threats and disturbance to sensitive crops or animals.

The overall result is that some lands are being privatised, opened up for new production, bringing in higher returns, creating a speculative market in land, allowing windfall profits and benefits to fall on some leasehold farmers. Alongside this the quantity of land directly categorised as conservation estate is increasing. But still many New Zealanders perceive it as a massive land grabbing exercise and a loss of land rights (primarily access rights) for the public of New Zealand.

Apart from this process of negotiated reform, the Crown is also able to enter the real estate market and purchase outright high country stations as and when they come on the market. The government has stated that direct purchase of some high country farms is an integral part of the tenure review process (Carter 2003). The government has recently purchased a 23700ha station for $10million to be set aside as a high country conservation park. This purchase has attracted some criticism because the price is too high (nearly twice the valuation), the government's actions are distorting the land market, the Department of Conservation (DoC) is not able to manage the land it already holds (e.g. inadequate resources

for weed control etc.), and because it effectively relegates production values in land behind conservation values.

While the area of land set aside in the conservation estate is increasing, much of it is the remote mountain tops, and is not likely to be visited by more than a few hardy mountaineers and adventurers. It provides little benefit for the average New Zealander wanting the experience of access to rural land.

Both the rationale for reform and criticism of the reform are illustrative of the conflicts that changing values in land bring. Do we need and value land for its productive values and should all land be used to its highest economic capacity? Do we think private ownership is the best tenure form for good land stewardship? Does access to and conservation of land require legislative protection or public ownership? And finally, if we want public access to and across land, and if we want to protect the conservation values in land, are we prepared to pay for it by way of compensation, or do we expect that cost to be borne by the landowner.

In essence, the issues are about the nature of property rights; rights and responsibilities of private ownership, rights of the public (which usually centre around public access as opposed to the more abstract rights like the conservation of nature) and the duties of the Crown to manage and control the land. The answers are not clear, and require New Zealanders to reassess what they value in land.

5. RURAL / RESIDENTIAL SUBDIVISION

As already stated, New Zealanders have an affinity with the mountains, lakes and water and have always gravitated towards areas of special natural beauty for homes and more so for holidays. To have a bach (crib, cottage) at the beach or lake or river was a very real possibility and a common experience for a very large proportion of the population. These were predominantly basic and simple affairs because along with the escape from the cities into a more natural environment, there was an escape to a simpler more basic way of life, away from the trappings of urban and suburban residential and working life - a low impact existence.

It would seem that now this also has changed; special lakes and coastlines are the setting of a wild property boom, land values are escalating much faster that other commodities, properties are being built in a style which rivals even the grandest suburban residences and the simple bach is being squeezed out. Consequently, those special places are becoming more and more exclusive – the playgrounds of the wealthy, the non-resident, and apparently more and more, the non-New Zealanders (see Part 6). There is very high demand for both township sections and rural/residential allotments.

Not only has this resulted in barriers to affordability of otherwise popular holiday spots, it has also significantly changed the character of these places. Gone are the quiet sleepy and compact towns. Now places like Queenstown and Wanaka are sites of bustling activity particularly within the building and surveying sectors and with tourism.

The landscape has been converted from an extensive grazing open space view which had the appearance of a benevolent wilderness to an accumulation of small-holdings including houses and out-buildings, fences, hedges, access roads, and miscellaneous horticultural crops and ornamental gardens.

Land developers are inciting a modern land rush. Such is the demand, that new land parcels are being 'sold' before title is ready and often before subdivision consents are even applied for. Some purchasers then have to wait two or more years to get title to their land. Some get their contracts cancelled when consent conditions are not acceptable, and then slightly reconfigured lots may be offered back to them at up to twice the price.

One of the problems seems to be that local authorities have little scope for actually planning for growth. The legislation (the Resource Management Act 1991 - RMA) merely requires them to assess all applications for development on the basis of the rather undefined concept of sustainable management. The test for this is often reduced to a question of avoiding, remedying or mitigating the adverse effects of the activity (RMA s5 (2)(c)). Furthermore it is rather difficult to identify effects on landscape as adverse, or to assess how the individual effects of single developments contribute to a wider cumulative effect.

Most of the world's most notable landscapes feature the objects of human development – single landmark buildings, groupings of buildings, or groupings of other structures, planting, or other environmental modification all having a variety of environmental effects. It is impossible to say that land subdivision and development is inherently adverse to the environment and similarly impossible to decide just when or if the effects of over-development become adverse. However complaints are frequent about the domestication of our open landscapes. In one example, in our premier tourist resort, there has been high demand for land of any size – urban allotments or rural lifestyle blocks. In the process the open space attributes are being lost. The residents who got there first, who were attracted to the wide open unspoiled spaces, now find more and more people wanting what they have. Those who have benefited from an early subdivision have their slice of heaven and now want to prevent further subdivision and development. As each new group arrives at a special place, they end up wanting it to stay as they first saw it, while early arrivals feel it may already be degraded by new development.

Precedents of consents for past developments make it difficult for consent authorities to deny later development. The free market dominates in land development and in spite of environmental management legislation, economic factors dominate over social or environmental concerns.

One effect of such strong demand for land for housing is that the productive values in land are exceeded by the speculative development values. It is no longer viable to farm the land when the value in subdividing the land for residential use is so high. Previous legislation recognised a need to protect high class soils and productive land from inappropriate subdivision. But there is no valid test anymore for when a subdivision of land is inappropriate.

Section 5 of the RMA sets out the overriding purpose of the Act: the sustainable management of natural and physical resources, including safeguarding the life-supporting capacity of air, water, soil, and ecosystems. Section 6 further sets out matters of national importance:

a) *The **preservation of the natural character** of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and **the protection of them from inappropriate subdivision**, use and development:*

b) *The **protection of outstanding natural features and landscapes from inappropriate subdivision**, use, and development. …* (RMA 1991)

The Environment Court is the forum for appealing resource consents for such development, and recent decisions illustrate the conflicting and inconsistent values and interpretations:

- Development of a comprehensive residential use on an important lakeside would modify the finite natural resources of the site and defeat the purposes of s5. [1)]
- Section 5 is particularly opposed to subdivision of rural land; arguments based on land having no productive value do not overcome the "need" for the continued existence of some land in a natural or virgin state free of any development because of the contribution in its virgin state to the quality of life. [2)]
- Subdivision of rural land into small lot sizes is not a sustainable use of the resource. It is sustainable to leave the land as it is, so there is a future option of an amalgamation into larger titles or some other productive use.[3)]

But others take a different view:

- Where land was not an economic unit and its grazing potential would not be lost, subdivision is a sustainable management of the natural land resource. [4)]

Landscapes are cultural features as much as physical features. Is there any justification to say that any subdivision is inappropriate? All landscapes already include anthropogenic features and have been modified in various ways by human activity; fire, farming, access. It is therefore difficult to say what is the potential for a landscape to absorb further development and what effects that development will have on the landscape.

It would appear that New Zealand is moving into a new era of greater population pressures, greater demand for land and housing and consequently having to adjust ideas about the character of the New Zealand countryside. Landscapes and land productivity is being lost to new subdivision and development. It is not just sentimental and nostalgia which opposes new development; environmental protection suffers also. On the other hand, economics encourages new development. How is a balance to be forged? New Zealanders need to work out how their value systems relate to current demands and trends.

6. FOREIGN OWNERSHIP

The availability and possibility of ownership of land in New Zealand has been an enticing drawcard for people from around the world since the early nineteenth century. The land

market which subsequently developed and the wealth derived from production off the land has fuelled the economic development and growth of New Zealand ever since.

New Zealanders have grown up with the underlying belief that land should be available to all, and especially that home ownership is a basic right of all and must be within reach. However, in recent years the land market has been changing considerably. The price of land relative to other economic indicators has been increasing rapidly. While this has been a boon to existing landowners, many of whom have benefited from the windfall profits on their land, the situation is rather less desirable at the other end of the social ladder – those who do not own property, and perhaps especially the first homebuyers.

The reasons for the rapid inflation of property values are no doubt many and varied. But one convenient scapegoat has been identified: foreign buyers. Relative to many countries, land prices in New Zealand are still very affordable – especially land with special scenic attributes – coastline, river and mountain locations. There have recently been several high profile purchases of land with unique qualities or special significance (Ansley 2002). These have lead to some public concern that New Zealanders are loosing control of their country and that somehow their sovereignty is being threatened.

The question therefore needs to be asked; who should be allowed to buy and own land in New Zealand? A civil rights argument would answer that everyone should be allowed to own land, and but for the restrictions on foreign ownership, that appears to be the case. Generally there is no impediment (other than financial) to any New Zealander owning land. New Zealand owners do not need to be people of good character, they can be criminals, or otherwise undesirable, they do not need to be resident in New Zealand, they do not need to invest any profit from production or sales in New Zealand, they are under no obligation to use it productively, they can leave their land to waste, they can even allow it to erode away.

So why are there restrictions on foreign ownership? The rules of the Overseas Investment Commission say that any foreign applicant for land purchase should be a person of good character. Applicants are often required to show that they are going to further contribute to the economy by making the land more productive, they may even be required to be resident in New Zealand.

In light of this comparison it is difficult to see the justification for any restrictions on foreign ownership beyond resentment by some about high property values. Many New Zealanders have benefited from the buoyant land market and it has fuelled a buoyant economy. There is no doubt, many foreign owners contribute to the economy – by bringing in the money for the initial purchase, often by having sufficient development funds to increase production, as well as by bringing in new ideas, new technology, or access to new markets. They also can contribute to environmental protection by setting land aside for conservation rather than necessarily needing to produce at maximum levels.

The philosophies attaching to land and ownership are getting more varied and confused lately. In the past, there was a perceived responsibility for landowners to put their land to the most productive use, both for their own economic good and for that of the country. This has

changed relatively recently to a consideration of the responsibility for environmental guardianship.

It has been suggested that foreign owners do not have the same ethic of the public character of private rural land, will not tolerate public access and may have less consideration for the long term health of the land. The Acland report on access (Land Access Ministerial Reference Group 2003) briefly makes mention of foreign ownership, but separately, John Acland, a high country pastoral farmer, has expressed concern that foreign owners do not have a kiwi ethic of accepting some level of public access across private land. Given the changing land uses and rural values occuring on much of the rural land (e.g. grape growing in Central Otago) and a new class of landowners taking over (including city-based investor farmers), New Zealanders may need to re-evaluate their expectations about land and the rights of ownership.

The Minister in charge of the Overseas Investment Act states that he wants to give New Zealanders "greater confidence that we're not losing the ownership of our own country" (Cullen 2003). This seems to be playing on irrational national xenophobia, but it illustrates how New Zealanders need to keep reassessing their ideas about land tenure.

7. MAORI TREATY SETTLEMENTS

The Treaty of Waitangi, signed in 1840, specifically recognised and guaranteed for Maori 'the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries …so long as it is their wish to retain the same… but yield to Her Majesty the exclusive right of Preemption …"

Most of the early purchases of land from Maori obviously included an exchange of money. However, the evidence of colonisation shows that it was the active policy of the government to pay Maori the minimum amount possible for their land so that substantial profits could then be made in the on-selling to European settlers. Other agreements for the transfer of land included the setting aside of 10% of the land for the continued occupation of Maori, the provision of schools, hospitals and other goods and services. Not many of these agreements were fulfilled.

It is quite clear that English systems and administration have often not treated Maori very fairly. This is especially the case when considering land. Maori loss of land played a big part in Maori alienation from society and from participating effectively in the economy, and in the normal wealth accumulation that usually follows land ownership (both because of production capacity and for its investment value increase).

Government and legal institutions have been active in alienating Maori from their land to the benefit of non-Maori ownership and production. In fact, analysis of the processes of the Native Land Court shows that it operated more to implement government policy than as an independent court ascertaining the Maori owners of Maori land (Williams 1999). Other government institutions, legislation and policy direction also worked against the guarantees

of the Treaty. The government has now acknowledged that there have been serious breaches of the Treaty of Waitangi in the past.

In recompense, the government set up the Waitangi Tribunal in 1975 to investigate and report on breaches of the Treaty. There is now an avenue for Maori to make claims against the government in a form which allows for a recognition of tikanga Maori (in accordance with custom, culture and tradition). The Crown is then able to negotiate settlements of the various claims. Typically these settlements have included a lump sum payment to a formalised iwi corporation. Such sums have often been only a fraction of the value of lands and services lost by Maori, but they have been affordable and acceptable to all parties. The monies have usually been applied to sensible investments from which the iwi has been able to support iwi members in education, health and business establishment. In other words, the monetary settlement has been returned to the community at large in the form of the multiplier effect of economic development. Land parcels have been offered to iwi, customary rights (like seafood gathering) have been recognised, place names have been altered to better recognise Maori connections with the land, and Maori authorities have been given more say in resource management and conservation authorities. The settlements often also include provisions for iwi to purchase (be given first offer on) any sale of Crown land no longer required for government purposes. This includes lands held but not used for post offices, police stations, refuse dumps, water reservoirs, roads etc.

The Waitangi Tribunal settlements have provided Maori with the means to achieve some equality within New Zealand society. Although these claims are fundamentally based on a recognition of Maori property rights, there is a growing perception and resentment by a rather ill-informed New Zealand public that Maori are being granted new and greater rights than all other New Zealanders. The irony is lost on many, that for a country built on a property rights regime, Maori property rights have been ignored, as if they are lesser rights and are not as worthy of protection.

Furthermore, the settlement process is slow and hard fought. Non-Maori New Zealanders are asking when is enough enough? When can we put the past behind us and move forward into the future as one people? Land ownership, management and control issues are at the centre of Crown settlements with Maori, but also at the centre of growing social divisions.

8. FORESHORE AND SEABED

In June 2003, the New Zealand Court of Appeal released its decision on Maori customary rights to the foreshore and seabed.[5)] The decision is a timely clarification of the law about the role of Maori customary title and of tikanga Maori within the common law of New Zealand. However the decision has been greeted with some degree of panic by a large section of the public and the government. The decision has confirmed that Maori customary title to the foreshore and seabed may exist in New Zealand law.

English common law assumes that the Crown owns the foreshore and seabed. There are two apparent reasons for such an assumption:

1) the foreshore is not capable of being owned because it is not cultivatable or able to be occupied or possessed due to the fact that, on average, half the time it is under water, and
2) the seabed is part of the royal commons that should be reserved for public navigation and fishing.

These assumptions have not however, prevented the Crown from making specific grants to many areas of the foreshore and seabed. For example, around New Zealand there are areas of foreshore and seabed granted to port companies, aquaculture companies, farmers of adjoining dry land, individuals, and Maori. This grant of title or other rights to the foreshore and seabed has not generally or necessarily excluded the public, nor inhibited the right of free navigation, recreational access, or recreational fishing, and to a large extent has been unquestioned and undisputed in New Zealand.

The developing aquaculture industry and the permits and licenses required for it, were effectively increasing the extent of the privatisation of the sea. It was the Crown's actions of creating this regime of increased property rights in the sea that sparked the Maori claim. If property rights are to be asserted, then Maori rights must necessarily be recognised first.

English law was imported into New Zealand with British sovereignty, and more explicitly by the English Laws Act 1858, but only "so far as applicable to the circumstances of the Colony." The relevant circumstances of course, were that Maori were well established in New Zealand, had their own customs amounting to a civil society, and rights in property evidenced by their long occupation and possession of all the lands of New Zealand. They had customary title to the whole extent of New Zealand.

The Crown however applied an English property conception to land in New Zealand and took what is often referred to as 'radical' title to the land. This radical title is similar to a jurisdictional authority over the land, based on sovereignty, rather than an actual property right. This property view has been described as a legal fiction to support the doctrine of tenure. The Crown's radical title was always subject to the customary title of Maori. Maori title was recognised by the common law, by policy announcements from the Colonial office, and furthermore the Treaty of Waitangi explicitly guaranteed it. The property regime in New Zealand thus partly originates in the English common law of property, but more so now, alongside a recognition of Maori customary title.

Maori customary title is asserted by Maori in accordance with tikanga Maori and it is quite a different property right from that which derives from the Crown. Customary title is not restricted by English common law assumptions of what is, and what is not, subject to ownership. Maori customary title should not be equated with the concepts and incidents of title as known to the common law of England.

There has been no absolute or clear definition within NZ common law of the content of customary title. The Maori Land Court has been established both as the arena to discover the evidence of tikanga and as the authority for the determination of title based on proof of these Maori arguments. Maori controlled, occupied, possessed and used the sea in much the same

way as they controlled, occupied, possessed and used the dry land and its resources. Therefore what should be claimed under tikanga is the whole of the sea, including the water.

Maori clearly have an interest in the use, development, management and control of the foreshore and sea. This is based on traditional use. Recognition of Maori customary title would allow for those interests to have real effect. Furthermore, the customary right is subject to development and the full protection of the Crown, and so Maori will be expecting to participate fully in modern aquaculture and the management regimes supporting commercial development of the sea, as well as allowing for the recognition of their cultural connection to the realm of Tangaroa (God of the sea).

There has been no suggestion by Maori that the recognition of a Maori customary title would entail an exclusive right that would deny the public normal recreational access to the beaches. Even the fee simple titles and the existing leases and licenses over the sea, have little effect on such public rights. The public rights of navigation, fishing and access (subject to reasonable controls, e.g. for safety) is compatible with these forms of title.

The Crown has reacted to the court decision by proposing a legislative override to the effect that all foreshore and seabed will be excluded from any property right regime and will be defined as Public Domain (Department of Prime Minister and Cabinet 2003). The concern to ensure continued public and open access to beaches is a worthy one but if that process effectively confiscates a legitimate Maori customary right it is clearly unjust.

Again, a public perception is that Maori are being granted greater rights than other New Zealanders. But if a property rights regime protects the economic, social, cultural and physical attributes of land, then it must first of all protect the interests of the indigenous people of New Zealand.

9. CONCLUSION

Property in New Zealand is supported by a strong and reliable cadastral system. The tenure regime can be relied on to guarantee and protect property rights. New legislation, new pressures within the property market and new social and environmental conditions have disturbed the status quo. There is now a need to renegotiate the allocation and content of rights in land. Conflicts exist between private property and public rights, between orthodox English legal rights and indigenous customary rights, and between land productivity and land conservation.

New Zealand's economy is primarily based on efficient rural production; land has productive value, tourism value, and investment value. Land has aesthetic values, conservation values, and cultural and spiritual values, especially for Maori. Furthermore, New Zealanders are increasingly demanding land to be set aside for access and recreation – demands that will inevitably disturb private property rights.

A clear property rights regime, modified by environmental legislation, may provide the answers to sustainable land use. It may allow for mediation between the rights of individual

property owners and the rights of the New Zealand public. It may balance the duties and responsibilities of the Crown, the landowners and the general public. It may provide adequate environmental protection, as well as fulfilling the societal expectations of the land. It may allow for acknowledgement of indigenous world views as well as western legal views about the role of land tenure. But there is going to have to be a rethinking of the legal, cultural and physical role of land, and there needs to be a consideration of whose rights are being protected and whose overridden in the process.

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BIOGRAPHICAL NOTES

Mick Strack has had extensive experience as a practising surveyor in various locations around the world. For the last 8 years he has been lecturing in land tenure studies and environmental ethics. His research interests include land tenure, property rights and land law, customary rights and aboriginal tenure, rights in rivers, lakes and the sea, environmental management, sustainability, and urban planning. His PhD research is examining indigenous rights in rivers with a focus on a comparison between New Zealand and Canada.

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