KINGDOMS IN THE HILLS
LAW AND POLITICS IN THE SOUTH ISLAND HIGH COUNTRY

David Round*

I. The Scene

The high country of the eastern South Island seems to us a place of eternal freedom and a timeless way of life. Under the broad nor'west sky those elemental figures, the musterer, his dogs and his horse move among the waving tussocks on the strong brown hills. In our imaginations, at least, little has changed since the first gentlemen drove their sheep up the gorges, built their huts and wrote their names in the Land Book.

Yet change has been as constant here as anywhere. The landscape itself is much barer than when the first of the squatters arrived. Then it was a dense wilderness of tall tussock, matagouri and native aniseed, cabbage tree and wild Irishman.[1] Burning the tussock, later regularly practised in order to bring on fresh palatable growth, with harmful consequences for the plants themselves, was necessary at first simply to clear the way for sheep and men to move. It was even used at times as a mustering technique. And before the 'fires of Tamatea', of moa-hunter times, much of this tussock land was actually forested. Changes continue in native vegetation, weed species and soil fertility, and human understanding of ecological relationships and history continues to develop.

Legal arrangements also change. The legal setting with which all living parties are familiar and within which the current controversies are still argued is that established by the *Land Act 1948*. That Act, as will be explained in Part II, finally gave runholders security of tenure. Their leases were renewable in perpetuity. The basic elements of a pastoral lease which the Act established are repeated in Part I of the *Crown Pastoral Land Act 1998*. The *Land Act* was at the time generally considered to have made significant improvements in legal arrangements which would consequently improve land management. David McLeod, long the runholder at Grasmere, near Arthurs Pass, described the Act[2] as

> a wise and far-reaching piece of legislation designed to make fundamental changes in the whole approach to pastoral land administration, and to take into consideration the emergence of soil conservation as a factor in the Lands Department responsibility. It

* LLB(Hons) (Cantuar), Lecturer in Law, University of Canterbury. Also a member of the national executive and Pastoral Lands Convenor of Federated Mountain Clubs Inc (FMC).

1 Although 'wild Irishman' is more commonly used these days as a synonym for matagouri (*discaria toumatu*), the name is used in many parts of the English-speaking world to refer to any prickly unsociable plant, and was often used here to refer not to *discaria* but to the various species of Spaniard or speargrass (*aciphylla*).

2 *Down From The Tussock Ranges* (Whitcoulls, Wellington, 1989) 129.

> gave us a permanent right of renewal for pastoral leases with a thirty-three year term, but it required tenants to accept stock limitations designed to protect the vegetation on erodible lands.

McLeod believed, indeed, that without the security provided by the new Act, high country pastoralism would soon have been impossible, especially given the demands which could be imposed by Catchment Boards under the *Soil Conservation and Rivers Control Act 1941*.

Change did not, however, cease in 1948. Several developments, which may seem almost to contradict each other, have since made themselves apparent, and they form the subject of this paper. From a narrowly legal point of view, the most obvious is a strengthening of the legal position of runholders. The term 'runholder' is used to denote the occupier of such pastoral land is a useful neutral term since (as will be seen) the use of the term 'pastoral lessee' might be considered to be begging a certain question. Two recent judicial decisions, of the High Court and the Land Valuation Tribunal, have established more precisely the exact legal nature of a pastoral lease as one indeed granting exclusive possession, but for all that, one where only a strictly limited rental may be charged. These decisions (which confirm common long-held, but recently disputed opinion) have come late in the pastoral lease's long history, at a time when the number of leases is being steadily reduced by the process of 'tenure review'. This process was clearly and firmly established by a new statute, the *Crown Pastoral Land Act 1998*. The usual (but not inevitable) end of tenure review is that, after negotiations and public consultation, some parts of a run will be surrendered to the Crown, to become part of the public conservation estate, and the runholder will obtain a freehold estate to the rest. Tenure review is described further in Part IV.

The establishment of the process of tenure review was however based on, *inter alia*, the belief that a change from pastoral lease tenure was absolutely necessary, simply because pastoralism, as a land use, just was not physically sustainable. Despite the security offered by perpetually renewable leases under the 1948 Act, land degradation had continued, and therefore the law (which allowed *only* pastoral use of the land) had somehow to be altered to allow other more sustainable uses or retirement and no use at all. The *Crown Pastoral Land Act 1998*, the chief purpose of which was the establishment of tenure review, was predicated on the belief that pastoralism, as a long-term land use, was doomed. Security of pastoral lease tenure was not enough.

The 1998 Act was therefore largely welcomed by conservationists and feared by runholders. But since its creation there has been, as explained in Parts III and XII, an amazing reversal of attitudes. Runholders, initially suspicious of tenure review, are entering the process in considerable numbers. Influential and prominent parts of the conservation interest, however, which had strongly supported and publicised the opinions declaring pastoralism unsustainable, and changes in tenure therefore necessary, have since changed their minds. Many of them now oppose tenure review and an end to pastoral leases. This attitude directly contradicts the messages these interest groups were promoting at the time the 1998 Act was passed. Conservation interests

now often oppose the freeholding of lower pastoral lease country (it is the higher country that tends to go the conservation estate) on the ground that this lowland country still has substantial natural values.

We are therefore further away than ever from an *agreed* solution to land management problems in the high country. Indeed, conservationist opposition to tenure review, based as it is on the assertion that lower country still has substantial conservation values, might even suggest that those problems do not exist or at least are not very great. Changes will certainly occur, in landscapes, flora and fauna as consequence of tenure review, but, as already observed, change has long occurred here as elsewhere; and it is hard to believe that much further serious destruction will occur, or that nature is not springing back in many places. Vineyards, lifestyle blocks, even dairy farms in places may colour the lower slopes here and there, but perhaps it is possible to fret too much.

Amid this disagreement and uncertainty the legal status quo is likelier to continue; pastoral lease land will continue to be grazed, land resumed by the Crown under tenure review and allocated to conservation will not be grazed at all, and land freeholded under tenure review may be more intensively farmed or applied to other uses. Until we can reach agreement and certainty we cannot be sure which of these outcomes is the best for any particular area - the best for the land itself and its plants and animals, and the best for any lessee or freehold owner. This is a pity. One day we will find out, but by then it will probably be far too late to make good any errors we have made.

II. The Legacy of the Past

Section 66(1) of the *Land Act 1948* provided that

> a pastoral lease or pastoral occupation licence … shall entitle the holder thereof to the exclusive right of pasturage over the land comprised in his lease or licence, but shall give him no right to the soil.

Sub-section (3) added that

> a pastoral lease under this Act shall be a lease for a term of 33 years with a perpetual right of renewal for the same term but with no right of acquiring the fee simple.

These provisions have been repeated almost verbatim in Part I of the *Crown Pastoral Land Act 1998* (hereafter the CPLA). Section 4 of the CPLA provides:

> A pastoral lease gives the holder-
> (a) The exclusive right of pasturage over the land
> (b) A perpetual right of renewal for terms of 33 years
> (c) No right to the soil
> (d) No right to acquire the fee simple of any of the land.

Both statutes have detailed provisions as to the calculation of the rent to be paid.

This had not always been the legal situation. Before the abolition of the provinces in 1877, each province had made its own provisions as to the squatting system. 'Squatting', in this sense, originally an Australian term, means the renting of large areas of unimproved native pasture cheaply and

running stock thereon. The Wakefield colonisation model, followed in particular in Canterbury and Nelson and – to a lesser extent – in Otago, initially opposed squatting, preferring that land should be purchased by colonists at a 'sufficient price', so that the new colonies could afford public works and further assisted immigration. Insufficient numbers of purchasers, however, were ready to sink their limited capital into land distant from the centres of the new colonies, and the provinces consequently had to cut their coat to suit their cloth. Originally much of the plains and lowlands, not just the 'high country', was the subject of pastoral leases, but like the wild things themselves, the leases have retreated before the advance of civilisation. Even in the nineteenth century, occasional doubts had been expressed about possible land degradation, although Lady Barker's 'exceeding joy of burning' was the common attitude. As early as 1920, a Southern Pastoral Lands Commission reported that the deterioration of the land had various causes, including burning the tussock (especially in the wrong season), overstocking, rabbits, continuous grazing for seventy years without improvement, and also the tenures under which the land was and had been held, and some of the conditions of such tenures.

For the early tenures were precarious. Before 1914, most leases were for terms of seven or fourteen years, and when a lease expired a runholder was obliged to bid for a new lease at auction against all comers. (Many runholders took the precaution of freeholding strategic paddocks, riversides and access points to render their runs inconvenient and less valuable to anyone else, but this was not always possible.) At one time it was possible for anyone, even a stranger, to purchase the freehold from underneath a lease, although in hard country there was often little economic incentive for any but the runholder to do so.[3] In fact, the precarious nature of the tenure provided an economic incentive to mine the land as swiftly as possible for an economic return, regardless of any longer-term considerations which were, in any case, usually little understood. The *Land Act* of 1924 made some changes to tenures and administration, but McLeod's 'fundamental changes' came only with the *Land Act* of 1948. That Act was in the nature of a bargain with runholders; hand in hand with the security of tenure it gave them came controls on land use for the purposes of soil conservation and erosion control, including the ability to impose stock limitations, and obligations of good husbandry.[4] Before then, as McLeod writes:[5]

> [t]he only touchstone for judging land use was the condition of the sheep in the autumn. When I took over the management of my little kingdom in 1930 I had no other task than to perpetuate the traditional system of management, making use of every available square yard, however rugged or inaccessible, and of every plant that sheep would eat, no matter what its value might be to the environment as a whole.

3 R M Burdon, *High Country* (1938) contains several chapters on the twists and turns of the land laws.

4 In *New Zealand Fish and Game Council v The Attorney-General* (2009) 10 NZCPR 351 – a case discussed below - Simon France J, at [77], quotes a form letter sent by the Minister of Lands to all current occupiers after the passing of the 1948 Act, which reflects on the advantages conferred on runholders by the new legislation.

5 *Down from The Tussock Ranges*, 17.

III. Tenure and Management

The *Land Act 1948* is then the start of the modern story. That story has by no means ended. As the 1920 Southern Pastoral Lands Commission recognised, the legal arrangements – the tenure – by which land is held can profoundly influence the way in which that land is managed. Stated baldly enough, that is a truism. It is the basis of Garrett Hardin's analysis of the tragedy of the commons. Garrett Hardin may have failed in his historical understanding and his understanding of human nature; he may have been too ready to assume that the use of communally-owned property cannot be regulated effectively;[6] but for all that we would have to recognise a kernel of truth in the theoretical proposition that public property, especially unregulated public property, may well be managed differently from private property. These consequences of ownership are also why we maintain the public conservation estate; because we recognise that private owners are, not necessarily unreasonably, likely to put their own interests before the public's, and not necessarily manage for conservation values that will not serve their own self-interest.[7]

Land tenure, then, can affect land management. The precise nature of and the rights attaching to pastoral lease tenure have therefore been not just the domain of the leaseholders themselves, or of academics intrigued by what might seem to be an interesting form of statutory property. Since the mid-1980s, at least, they have been the subject of earnest and thoughtful consideration by the influential conservation and outdoor recreation movement. Television, newspapers and magazines have from time to time featured stories about tenure review and public property interests. Furious debates over land tenure by and large belong to an earlier period in New

6 One can find some of the practical historical and psychological criticisms of Hardin's Tragedy collected in David Round, 'De Meo et Tuo, or, The True Nostrum' [1991] 4 *Canterbury Law Review* 447, 461- 462. Commons may have been well-managed for centuries, but Hardin gives no credit to the organisation of the community or the social system, explaining it instead as a consequence of sundry hardships and misfortunes which happened to keep animal and human populations below carrying capacity. 'The ignoring of the success of manorial courts in regulating commons … is not only unhistorical - it is also a strange view of human nature. These farmers, it seems, do not talk to each other. Culture and community seem non-existent.' If commoners fail to agree, that failure could, if anything, be considered an argument for the inability of human beings to see where their own best interests lie; and the remedy for that shortsightedness, it might well be argued, could just as logically be claimed to be submission to the Leviathan as the privatisation of communal property.

7 For this reason the conservation and outdoor recreation movement by and large opposed the proposal, in the Crown's 1994 *Proposals For the Settlement of Treaty Claims*, that Maori might be given substantial areas of the conservation estate. The Crown and the Green Party argued that management was the important thing, not the mere details of ownership. If land were to continue to be managed for conservation purposes, what objection could there be to a merely formal change of legal owner? But '[t]he obvious answer to this is simply that different owners manage in different ways. Change the owner and manager, and you inevitably change the management. This is why we have public property; because any private landowner will (perfectly reasonably) put his own interests before those of the public. Management by private parties for public purposes is doomed to failure. Maori may complain that the conservation movement does not trust them. The reply must be that no private interests, Maori or European, can be trusted - or even expected - to seek the common good.' D J Round, *Truth or Treaty, Commonsense Questions About the Treaty of Waitangi*, 1998.

Zealand's history, and these days are incomprehensible to all but the scholar and the political historian, but we catch a present-day echo of them in the high hills.

Land tenure *can* affect management. It was for that reason that conservation interests supported tenure review, so as to put areas of high conservation value into the conservation estate where management would be solely for conservation purposes. But conservationists' more recent opposition to freeholding suggests that they now consider that pastoral lease tenure was not as environmentally harmful as it had recently been painted. But conservationists' more recent opposition to freeholding suggests that they now consider that pastoral lease tenure was not as environmentally harmful as it had recently been painted, or at least consider that the possible consequences of freeholding - changes in and intensification of land use, and subdivision and residential development - outweigh the benefits of protection elsewhere. Conservationists certainly have a lack of faith in the ability of the *Resource Management Act* to impose serious controls on land use; but that opinion is widely held.

As mentioned before and explained later, the High Court has recently pronounced on the very nature of a pastoral lease (parts VI, VII and VIII), and the Land Valuation Tribunal has ruled on the calculation of rent (parts IX and X). Another matter, the possible exercise of the suspending power, has never been subject to judicial scrutiny, and is not likely to be, given that the present government has reversed its predecessor's policy. (This is considered in part V.) We might be surprised that the judicial decisions decide apparently fundamental and elementary points - the nature of a pastoral lease, and the principles on which rent under such a lease should be calculated. Surely, we might think, these matters should have been established long ago. The fact that long-held assumptions are being called into question is evidence, if that were needed, of the context of public interest and policy.

Although these three legal issues – suspension, tenure and rent- seem, at one level, to be unrelated, they are all incidents, encounters, skirmishes, or even more - in a long battle in which land management issues and even often-unarticulated political attitudes play an important role. The consideration of each issue arose out of political agitation. In all three, that agitation was prompted by parts of what could loosely be described as the environmental movement; the battles were not of runholders' seeking. In all three cases, the eventual victory has been to the runholders and the understood *status quo*. The High Court declared that a pastoral lease is indeed a lease, as runholders had always understood it to be. The Land Valuation Tribunal declared that rent is to be calculated more or less as previously. (The action was brought by a pastoral lessee, but as a test case to challenge new government policy on rental calculation which had been promoted by environmental interests.) The policy of the Labour government which might have been an exercise of the suspending power has been withdrawn. The end result of the recent legal proceedings has been a strengthening of the runholder position.

Another intriguing theme also underlies recent events. As said above, there *can* be a relationship between land tenure and land management. A precarious tenure promotes short-term exploitation. But from the point

of view of land management a secure long-term lease may be every bit as good as a freehold. A remarkable phenomenon of the eleven years since the CPLA was enacted has been the reversal of attitudes, of both runholders and environmentalists, to pastoral leases and freeholding, and to the process of tenure review which facilitates freeholding. By and large runholders were originally suspicious of tenure review, and fearful that they would be forced into it. Environmentalists welcomed tenure review. Runholders claimed to have been responsible managers of the land for a century and a half under leasehold tenure; environmentalists emphasised environmental degradation, and considered the tenure of the land to be at least partly responsible. Now positions seem to have almost reversed. It is environmentalists who oppose tenure review, who fear the effects of freeholding and who seem, therefore, to prefer the pastoral lease as a land tenure.[8]

This raises a problem. Numerous voices over the years have opined that high country pastoralism use was likely to be unsustainable. The most authoritative and quoted opinion is probably that of in the 1994 South Island High Country Review, the so-called Martin Report, the report of a working party chaired by Mr G Martin on sustainable land management.[9] Its conclusion was that up to 80% of the high country that was in an unimproved condition was likely to be unsustainable. Sustainability – whatever that meant and means – surely had to take priority over all other needs, even social and economic ones. As for economics, the Rabbit and Land Management Programme, headed by Dr Morgan Williams (later Parliamentary Commissioner for the Environment) calculated that only 28% of Canterbury runs were economically viable. The rest were marginal or worse. Yet the provisions of the *Land Act* locked in pastoralism as the only legally-permitted use. That being so, the only environmentally acceptable solution would seem to be an end to pastoral leases. The law had to change. That was the environmentalist position. An environmentalist political position now that tenure review should end and pastoral leases remain seems to contradict once widely-accepted conclusions about the nature of the problem.

The 1994 Martin Report only confirmed what many already knew about land degradation in the high country. Such knowledge had already prompted the Hon Koro Wetere, Minister of Lands in the then Labour government, to announce in 1987 a major revision of the 1948 Act. There were other reasons, too, why the *Land Act* should change. Several Crown Law Office opinions of about this time declared that some of the high country policies of the Land Settlement Board (established under the 1948 Act to assist the Commissioner of Crown Lands and charged with, *inter alia*, developing

8 'Farmers and environmentalists have done a U-turn on their respective positions over high country land tenure review … The process had generally been supported by environmentalists in spite of concerns about some specific deals, whereas a farmer lobby group, the High Country Accord, had complained that landowners were getting a raw deal … But now the farmer lobby is back-pedalling at top speed …' *National Business Review*, 18th August 2006. Environmentalists' back-pedalling is mentioned below.

9 *South Island High Country Review: Final Report of the Working Party on Sustainable Land Management to the Ministers of Agriculture, Conservation and the Environment* (South Island High Country Review Working Party 1994).

particular policies in relation to pastoral land), although enlightened in terms of their attitude to recreation interests and wider environmental and conservation issues, were, for that very reason, beyond the powers conferred by the legislation. The *Land Act* had been made at a time when soil conservation was an issue of great public concern, not just in New Zealand, but in many parts of the world. The disaster of the great Dust Bowl of Oklahoma in the 'dirty thirties' preoccupied many thoughtful minds. But, although written with soil conservation in mind, the Act was written before wider issues, such as the conservation of ecosystems or provision for outdoor recreation, had arisen. Some of the practices developed by the Commissioner and his officers, particularly the practice of consulting the Department of Conservation before issuing burning permits, were also considered by Crown Law to be *ultra vires* the Act. Several instances came to public prominence in which runholders denied responsible members of the public the access which had previously been generally enjoyed. (Pastoral leases, which sometimes reach to the Main Divide, often contain very substantial areas of bush, alpine grassland, rock and even permanent snow which, although obviously of no use for pastoral purposes, may well be of great interest to hunters, trampers and mountaineers.) Especially after most publicly-owned native forests were brought into the Department of Conservation's administration, it was natural that the thoughts of conservationists should turn to these large areas of picturesque land, in many places still with significant natural values. A growing number of lessees, also, did not wish to be locked in to pastoralism, and wished to gain freehold title to their runs' lower, more productive land.

Between 1987 and 1998, then, there was much discussion as to the proper form which new legislation should have. It seemed clear that at its centre there had to be a change from the former principle that pastoralism was now and forever to be the only possible use. There had at least to be some mechanism, voluntary or compulsory, to allow a change to other uses. There was talk of a 'three way split', whereby productive land with little or no conservation value might be freeholded, higher land of high conservation value go to the Department of Conservation and land with both agricultural and conservation value remain in pastoral lease.[10] (Since this arrangement did not, obviously, do away with pastoral leases altogether, it did not relieve the Crown from the burden of administering them; a burden which was not only uncongenial to the privatising, market-oriented spirit of the times, but which was actually unprofitable to the Crown, for the costs of administration had for some time exceeded the income from rents.) There was talk of a simple 'two way split', some land to be freeholded and the rest to go to the Department of Conservation. Some keen environmentalists suggested that all pastoral lease land should pass to the Department, which might then issue grazing licences over appropriate parts of them. Some runholders

10 See the remarks by Mr David Gullen, of the Department of Lands, and later Commissioner of Crown Land, at the 1989 Hill and High Country Seminar, reported on page 9 of the Proceedings (New Zealand Mountain Lands Institute, Lincoln University 1989) and later comments on page 28 by J Bamford. The possibility was also discussed by public interest groups such as the Maruia Society and Public Access New Zealand (PANZ); see, for example, *Public Land News*, November 1988, 3.

suggested that all pastoral lease land might be freeholded, and the public interest provided for by *Resource Management Act* mechanisms, access easements and covenants, which might even take the form of management plans for the whole property. Conservationists tended to regard the *Resource Management Act* with cynicism, and covenants and easements as difficult to know, cumbersome to enforce, impossible to alter in the light of new knowledge and changed circumstances, and easy to remove.[11]

Discussion was vigorous, and feelings ran high, as indeed they continue to do. Runholders, recreationists and conservationists all loved this land, and all considered it in some deep sense to be 'theirs'. Runholders pointed to their leases as giving them substantial property rights, sometimes provocatively described as being virtually equivalent to a freehold. The environmental and recreational movement, considering itself, not without justification, as representing elements of the public interest, emphasised underlying Crown ownership and were inclined to minimise the runholders' legal interests. Runholders claimed to be the best possible stewards of this country; when examples of its degradation were raised, they pointed to the undoubted natural values which still obtain in many places as evidence of their good stewardship. The rhetoric of some on the conservation side sometimes echoed old debates in depicting runholders as a rich and privileged caste. Runholders at times felt themselves the objects of a campaign motivated as much by envy as environmental concern. Rhetoric aside, the financial terms of some earlier settlements under the CPLA, notably brought to public attention by Ann Brower,[12] justified public concern.

IV. The *Crown Pastoral Land Act 1998*

Remarkably enough, the *Crown Pastoral Land Act* (CPLA) itself, enacted in 1998 under a National government, has been pretty well accepted by all parties as a satisfactory framework. The Act has five parts, but only two need be our concern. Part I deals generally with pastoral leases and pastoral occupation licences, continuing many of the provisions in the *Land Act*, but altering others so that, for example, the Commissioner of Crown Lands must now consult the Director-General of Conservation before granting consent to lessees to burn, to disturb the soil (including the felling of bush and scrub, draining, ploughing, sowing and top-dressing) and granting recreation permits.[13] Part II of the Act, of fifty-nine sections, establishes on a clear and firm footing the process of 'tenure review', whereby the Commissioner may, on the written invitation of a lessee or lessees or with their agreement if he should initiate the matter,[14] undertake a review of land held under a lease or leases. (A similar review could indeed be read into the words of the *Land Act*, and had been followed by several runholders, but the words were obscure

11 See, for example, the submission of Public Access New Zealand (PANZ) to the Primary Production Select Committee hearing submissions on the Crown Pastoral Land Bill, 29 May 1995.

12 Her paper is mentioned below in Part VII.

13 *Crown Pastoral Land Act 1998*, s 18.

14 *Crown Pastoral Land Act 1998*, s 27.

and the process even more complex than it is at present.) Other sorts of neighbouring land – land held under occupation licence, unused Crown land, even freehold land and conservation land with the permission of the owner or the Minister of Conservation – may now be included in the review[15] so that a more comprehensive rationalisation of land holdings and use might be made. The Act sets out a procedure whereby a preliminary proposal may be put to lessees, designating lands to be restored to or retained in Crown ownership or control as conservation area, reserve or some other purpose, and land 'that may be disposed of to any person'.[16] Public notice must be given of these proposals, and after due consideration of objections and comments (which may, of course, be made by the lessee as well as anyone else) a substantive proposal may be put to the lessee. This may include[17] 'a notice specifying all amounts of money proposed to be paid to or by' the lessee in recognition of the differing values of the land to be freeholded and to be yielded to the Crown. Proposals may include 'protective mechanisms' – easements and covenants under various public interest statutes, and 'sustainable management covenants'.[18] The entire process is voluntary; reviews may be begun only with the consent of lessees, and must be discontinued if the Commissioner is so requested by lessees.[19] The ability of runholders, in particular, to walk away from negotiations has not assisted the Commissioners' agents in driving a hard bargain. The Commissioner, as mentioned below, also has the power to arrange the number and order of reviews and the resources to be devoted to them.[20]

Before moving to consider more specific legal issues, some figures may be in order.[21] The total area of the South Island high country is reckoned to be in the vicinity of 6,677,612 hectares. Of that, the largest proportion – 2,925,730 hectares, or about 44% – is actually private land. The second largest category, of 2,170,268 hectares – 33% – is of land already held by the Crown as Conservation land. Crown Pastoral Lease land, for all that it holds the greatest legal and public interest, is, perhaps surprisingly, only 16% of the total area, at 1,079,500 hectares, although recent tenure reviews have contributed to its reduction to that figure. (Statistics continue to alter as tenure review proposals continue to be implemented.) The balance is of Crown Pastoral Occupation Licence land – 46,845 hectares, less than one percent – and 'other Crown land', being 435,269 hectares, or about seven percent.

The same Cabinet paper also categorises existing conservation land according to its possible use for agriculture;[22] a matter of perhaps more than academic interest, since a not infrequent complaint against tenure review is

15 *Crown Pastoral Land Act 1998*, ss 28-31.
16 *Crown Pastoral Land Act 1998*, s 35.
17 *Crown Pastoral Land Act 1998*, s 46(4).
18 *Crown Pastoral Land Act 1998*, ss 40 and 97.
19 *Crown Pastoral Land Act 1998*, s 33.
20 *Crown Pastoral Land Act 1998*, s 32.
21 These data, provided by LINZ, are to be found in Table 1 of Appendix C to the 2009 Cabinet paper, *Crown Pastoral Land - 2009 and Beyond*, approved by Ministers on 13th and 14th July 2009.
22 Table 2 of Appendix C to 2009 Cabinet paper, *Crown Pastoral Land - 2009 and Beyond*.

that the Department of Conservation is obtaining 'too much land' – land which it is alleged to be incapable of managing, given the financial pressures upon it, and also in some cases land useful for agricultural production which is now (under a conservation regime) no longer possible. Of the Department's high country land, 1.55% is considered 'arable land, with high to moderate potential for primary production'. Another 10.26% is 'non-arable land with moderate potential, including under irrigation'. Another 27.69% is steep land with 'limited potential', and 60.5% has either nil or extremely limited potential. We must remember, though, that generally the life-forms and ecosystems of country more desirable to human beings – country which is at lower altitude, more fertile and habitable – suffer most from human activity, are consequently rarer, and therefore may well stand more in need of protection than the plant and animal communities of wilder harsher country. It is hardly unreasonable that the Department hold and protect some land that could be used productively. For a long time native lowland forests were virtually unrepresented in our protected lands. Remaining publicly-owned lowland forests now are protected; and if that protection be reasonable, despite that land's potential for productive human use, we may surely allow the same principle to apply to lower altitude high country.

The number of pastoral leases has always varied, as leases were subdivided (particularly common before 1948) or amalgamated.[23] In 1983, there were 369 pastoral lease runs. By the 31st of May 2009 the number was rather less.[24] 134 runs were not in the tenure review process at all. 72 were at an early information gathering and consultation stage. Twenty preliminary proposals had been advertised, ten cases were at the substantive proposal stage, and 62 reviews had been completed. To these we must add five whole property purchases, where the Crown has purchased an entire lease in order to add the land to the Conservation estate. (Such purchases are not actually tenure reviews.) These runs combined come to a total of 303. As to the land division between lessees and the Crown in runs that have already undergone tenure review, 48% was surrendered completely to the Crown to be administered by the department of Conservation as part of the public conservation estate (240,380 hectares) and 52% (256,676 hectares) to freehold. If one adds in the area (125,792 hectares) that came to the conservation estate by the five whole property purchases, then the total area which has by one means or another so far come back to full public ownership as part of the conservation estate from pastoral leases is 366,172 hectares, or 59%. The general expectation is that later runs entering tenure review will have a greater proportion of their land going to the Crown; many of the earlier runs to enter the process had greater proportions of land of high agricultural value which lessees were keen to use for non-pastoral purposes.

At the time of the Act's passage there was a widespread expectation on the part of many officials, certainly in the Department of Conservation and the Commissioner's office, that all pastoral leases would soon undergo tenure

23 No new pastoral leases may now be created, following the amendment of s 62 of the *Land Act* by s 104 of the *Crown Pastoral Land Act 1998*.

24 Figures supplied by LINZ.

review and the tenure would therefore soon disappear.[25] Nevertheless the Crown accepts in the same Cabinet paper that it is 'likely to be a long-term owner and administrator' of pastoral land.

V. The Possible Exercise of the Suspending Power

The first of the three major legal issues to be considered here arose out of controversy over the operation of tenure review in relation to certain lakeside leases. Part II of the CPLA is concerned with tenure review, and s 24 gives the objects of Part II.

The objects of this Part are –

(a) To –
  (i) Promote the management of reviewable land in a way that is ecologically sustainable
  (ii) Subject to subparagraph (i), enable reviewable land capable of economic use to be freed from the management constraints (direct and indirect) resulting from its tenure under reviewable instrument; and
(b) To enable the protection of the significant inherent values of reviewable land –
  (i) By the creation of protective mechanisms; or (preferably)
  (ii) By the restoration of the land concerned to full Crown ownership and control; and
(c) Subject to paragraphs (a) and (b), to make easier
  (i) The securing of public access to and enjoyment of reviewable land; and
  (ii) The freehold disposal of reviewable land.

This remarkable section admirably mixes and balances the interests of all parties. It must also be one of the few statutory provisions to contain the word 'preferably'. Statutes do not usually declare themselves to be suggestions and guidelines.

In August 2003, the previous government agreed on ten objectives for the South Island high country. Many of these reflected section 24's words, and the others were certainly compatible with those words. Policy 5.1.7 was 'to ensure that conservation outcomes … are consistent with the New Zealand Biodiversity strategy'; 5.1.8 was to 'progressively establish a network of high country parks and reserves'; 5.1.9 was to 'foster sustainability of communities, infrastructure and economic growth, and the contribution of the high country to the economy of New Zealand', and 5.1.10 was to 'obtain a fair financial return to the crown on its high country assets'. In June 2007, however, following a public outcry over the final review proposals for Richmond Station, on the shores of Lake Tekapo, the government announced a further policy of excluding lakeside properties from tenure review. The outcry arose because about 6,000 of Richmond station's 9,567 hectares were to be freeholded, including about 11 kilometres of lake frontage. There was concern that the almost complete absence of subdivision controls in the

25 Numerous pers. comms.

Mackenzie District Plan would 'allow sprawling subdivision and trophy house blight which characterises parts of Lakes Wakatipu and Taupo'. There were also concerns, not necessarily strictly environmental in their motivation, that the on-selling of land for subdivision and other lakeshore development would result in 'substantial windfall gains at the public and Crown's expense'.[26]

The revised policy excluding lakeside properties from tenure review can only be summarised here.[27] The policy 'agrees that pastoral leases … with highly significant lakeside, landscape, biodiversity or other values that are unlikely to be protected to the satisfaction of the Crown by ... tenure review … be excluded from the process'. The 'default position', in fact, was that they be excluded. The Minister for Land Information was to ask the Commissioner to report on all properties entering tenure review before the Commissioner decided whether or not to undertake such a review. In any tenure review of lakeside property which did go ahead, certain conditions had to be complied with, involving in particular Crown ownership or at least restrictions on subdivision, and no significant alterations to the lakeshore. The Minister for Land Information was not to fund tenure review for properties adjoining or within five kilometres of the 'relevant lakes', those lakes being sixteen in number and ranging from Wakatipu (the largest) to Roxburgh (the smallest).

Such was the gist of the policy. It would surely seem on its face to be a purported exercise of the suspending power. The Commissioner is solely responsible for conducting reviews. True, s 27 says that he 'may' undertake a review at the invitation of the lessees or if they accept his own suggestion, but tenure review is one of the Act's chief purposes, and no official may by a 'may' consider himself free to ignore Parliament's will for no lawful reason. Nor is there anywhere in the Act any indication that the Minister has any right, not just to offer advice, but to make rulings as to which properties the Commissioner may and may not consider. Indeed, the power of the Commissioner to order or even discontinue reviews, granted in ss 32 and 33, although described in generous terms, must surely be exercised only in accordance with the purposes of the Act, one of which is the expediting of tenure review. Those sections provide:

> **32. Administration of reviews –** The Commissioner may, in the Commissioner's absolute discretion, decide -
> (a) How many reviews to undertake
> (b)The order in which reviews are to be undertaken
> (c) The urgency with which any review is to be undertaken
> (d) The resources to be devoted to any review.
> **33. Discontinuance of reviews –** The Commissioner may discontinue a review at any time; and must discontinue a review if asked in writing by the holder, or one of the holders [i.e. of the lease] concerned.

26 The concerns were widely expressed. The quotations are from Eugenie Sage, Forest and Bird spokeswoman, quoted in Roberta McIntyre, *Whose High Country?* (2008) 359.

27 It can be found in detail in the 2009 Cabinet paper, *Crown Pastoral Land – 2009 and Beyond*. prepared by the offices of the Ministers of Land Information, Agriculture and Conservation for the Cabinet Economic Growth and Infrastructure Committee.

There most certainly is no power given even to the Commissioner, let alone to the Minister, to impose a blanket ban on the review of certain sorts of lease. Section 32 gives the Commissioner only a power to place reviews in order, not to refuse any, and the Commissioner's powers in s 33 must clearly be exercised on a case by case basis.

It could perhaps be argued that landowners have wide discretion in the management of their lands and that that discretion is retained here by the Minister and Commissioner, being embodiments or manifestations of the land's owner, the Crown. By that argument ss 32 and 33 would merely be expressions of an already-existing discretion. But to take that approach would allow the Commissioner to thwart Parliaments' will. Parliament has declared that as a general rule tenure review is to be available to pastoral lessees. That right arises from the statute itself, not from the general nature of the lease itself, which of course expressly declares that it confers 'no right to the freehold'. It is trite law that general powers conferred by statutes may be exercised only in accordance with and furtherance of the statutory purposes. The powers in ss 32 and 33 to order and sometimes discontinue a review are given specifically to the Commissioner; it is impossible to discover any power granted to a Minister to divert the Commissioner away from the furtherance of the statutory intentions.

In any case, a Cabinet decision in 2009[28] rescinded the lakeside policy, considering that lakeside concerns could be mitigated by the Commissioner's existing legal obligation to consult the Director-General of Conservation, by referring specifically to lakesides in the strategic direction for pastoral land, and 'retaining the Minster for Land Information's role in approving funding for each … substantive proposal'. That funding role of the Minister nowhere appears in the CPLA, however. We would be reluctant to think that it might be used to interfere in the exercise of an official's statutory powers, although at the same time, of course, discretion must be exercised where there are more demands on public funds than there are funds.

This same Cabinet decision rescinded not just the lakeside policy but the entire list of objectives for the high country agreed upon by the previous government and referred to above. Instead, a new 'strategic direction' was established for Crown pastoral land. This is comprised of:

(a) An end outcome – 'that Crown pastoral land be put to the best use for New Zealand'
(b) A note that this outcome means that pastoral land 'be put to its best economic, environmental and cultural purposes'
(c) Objectives for pastoral land, which are:
    (i) stewardship – effective stewardship of Crown pastoral land ensures that :
        – ecologically sustainable management is promoted
        – pastoral and inherent values, including the natural character of lakesides and landscapes, are maintained and protected

28 CAB Min (09) 26/7C, 27th July 2009.

(ii) economic use:
– the contribution of Crown pastoral land to the New Zealand economy is promoted
– lessees of Crown pastoral land will be charged rent on the basis of the earning capacity of the property
(iii) relationships:
– the iconic nature of high country farming and its contribution to New Zealand culture is valued
– viable rural high country communities are valued

(d) An agreement to certain principles to apply in achieving the end outcome and objectives;
(i) the Crown and lessees endeavour to manage issues, including acting as a good neighbour for those issues that transcend property boundaries
(ii) the Crown acts as a good lessor
(iii) the Crown engages appropriately with South Island high country parties.

The commitment to charge rent 'on the basis of the earning value of the property' is of particular interest in the light of the discussion below concerning valuations and rentals.

These objectives, like the previous government's objectives, are not merely objectives to guide tenure review, but general objectives for all Crown pastoral land, whether being reviewed or not. In relation to tenure review, it would be difficult to argue that any of the objectives are *ultra vires* the statute. Yet there is a sense of some change of attitude – at least of different emphases.

VI. The 'Pastoral Lease' – A Lease or a Licence?

Our second legal issue of concern is the true nature of the pastoral leases under which high country land is held. Although the term 'pastoral lease' was used by Parliament, and presumably intentionally,[29] there is an argument that the substance of a pastoral lease is more akin to the substance of a licence or *profit a prendre* than to a lease. The only right expressly given to a pastoral lessee, other than the right of renewal (which is quite irrelevant to the question of the nature of the instrument, for a lease need not have any right of renewal, is the 'exclusive right of pasturage'.[30] Such a right could be considered merely as a right to enter another's land for a particular purpose, and therefore not necessarily conferring the exclusive possession of the land characteristic of a lease.

This argument was apparently first advanced in public by J C Corry, a Wellington solicitor who acted for the New Zealand Deerstalkers Association (the NZDA), in a paper presented at the New Zealand Mountain Lands Institute 1989 Hill and High Country Seminar.[31] NZDA members,

29 Compare the views of Brennan CJ in *Wik Peoples v State of Queensland* (1996) 187 CLR 1, discussed below.

30 *Crown Pastoral Land Act 1998*, s 4(a).

31 *Proceedings of the 1989 Hill and High Country Seminar*, New Zealand Mountain Lands Institute, Lincoln University, 13-19.

unsurprisingly, have been among those who have suffered from arbitrary decisions by runholders to refuse access. Corry's argument that pastoral lessees might in fact be only pastoral *licensees* raised the possibility that it would not be necessary for hunters to obtain permission from the runholder/'lessee' before entering the pastoral 'lease'. Corry, be it noted, did not go further and argue that there would therefore be an automatic right in all members of the public to walk without permission on the lands of the Crown. The NZDA acknowledged that s 176 of the *Land Act* did make it an offence to trespass on Crown land. Nevertheless, if a lease were only a licence, then an authorised agent of the Crown would be entitled to give specified members of the public permission to enter, and the NZDA appeared to be confident that Crown agents would be prepared to do so.

The argument of the tenure's nature was finally settled only in 2009 by the High Court. Before considering that, we should note that acceptance of the licence argument would not necessarily have achieved the NZDA's aim of easier access. There is no right in the public to walk without permission on Crown land, indeed, as noted trespass on Crown land is a criminal offence. An agent of the Crown may grant permission to members of the public to enter on the land. However, those Crown agents, after receiving vigorous representations from their runholder licensees, might well feel inclined to refuse such permission. Indeed, the Crown might well delegate *to the runholders* the power to grant or refuse entry. That would not be unreasonable; they are the people on the spot, and it might well be more convenient for the public to ask them rather than some distant official. Thus holding the 'leases' to be 'licences' might confer little benefit on members of the public seeking access whereas the potential loss of pastoral lessees'/licensees' sympathy and fellow-feeling would be very perceptible.

Corry's principal arguments as to the nature of the tenure related to the substance of the rights conferred. The starting point was that, at least in cases where Parliament had not bestowed the name, the nature of a relationship, lease or licence, was to be determined by the substance of the arrangement and not by the name which the parties chose to give it. The House of Lords in *Street v Mountford*[32] said that '[t]he manufacture of a five-pronged implement for manual digging results in a fork, even if the manufacturer … insists that he has made and intended to make a spade'.[33] A licence, then, was a licence even if the parties choose to call it a lease. Now all a pastoral 'lessee' gains is a right to the grazing, the vesture. If he had a greater right, one of exclusive occupation, there would surely be no need to spell out this lesser right to graze. The fact that it was spelt out was, on this view, an indication that the right to graze was not part of anything greater but instead the only right. The 'lessee' of a run has no right to the soil; he may not sow or reap, plough, drain or cultivate - surely the normal incidents of agriculture - without the special permission of his landlord's agent, the Commissioner of Crown Lands. This again pointed to a lack of any right of exclusive occupation.

32 [1985] 2 All ER 289.

33 The same point has been made more recently in New Zealand in *Fatac Ltd (in liquidation) v Commissioner of Inland Revenue* (2002) 4 NZ ConvC 193,611.

Moreover, both a pastoral lease and what the *Land Act* and CPLA both call a pastoral occupation *licence* entitle the holder to *exactly the same thing* – the exclusive right of pasturage, but no right to the soil. The only difference between the lease and licence is that a pastoral occupation licence does not have any right of renewal – but as already observed, it is trite law that no right of renewal need exist in a lease, and a right of renewal is certainly immaterial to whether an arrangement be a lease or a licence. If the two legal regimes, pastoral lease and pastoral occupation licence, are in all material things exactly the same, might they not both be licences?

Corry accepted there were contrary indications. The fact that Parliament has chosen to describe the arrangement as a lease might count for something. An obligation to farm diligently and in a husbandlike manner could surely be argued to require exclusive possession. It might be the case that from time to time – at lambing time, most obviously – even pastoralism is inconsistent with public access. The lessee also has obligations to insure Crown improvements, and a right to compensation for his own improvements. These are more consistent with exclusive occupation than with a licence. Section 26 of the *Land Act* gave Lands Department officers a right of access for the purpose of inspecting the property, a right surely unnecessary to spell out if a lessee in fact had no exclusive occupation.

VII. The Lease/Licence Issue Revived

The lease/licence issue was not explored further until the matter was raised and publicised by Dr Ann Brower, an American Fulbright scholar. Dr Brower initially came to public attention in New Zealand with a report on another matter[34] revealing that runholders undergoing tenure review were not only obtaining the freehold to land of lower altitude which was then of much higher value than portions of leased land they surrendered to the Crown, but were very often, *also* receiving financial settlements from the Crown as compensation for their lost lands. Brower estimated that in the first 64 tenure reviews, the object of her study, 62% of the land had been freeholded and 38% had gone to the Department of Conservation. In the accompanying financial exchanges, however, by which one party compensated the other in the buying out of each other's interests, the Crown had *also* paid lessees $26,280,000, whereas lessees had paid the Crown only $10,800,000. Overall, then, lessees had received the larger proportion of land, that land also being of better potential for human use – pastoral agriculture, viticulture, tourism ventures, subdivision and so on – and also some fifteen and a half million dollars. This arose because the potential uses of the land which would 'explode into life' after freeholding were not given much or any consideration when these leases for purely pastoral purposes were being valued.

34 D Brower, *Interest Groups, Vested Interests and the Myth of Apolitical Administration: The Politics of Land Tenure Reform in the South Island of New Zealand*; report submitted to Fulbright New Zealand, University of California, Berkeley and Lincoln University, February 2006.

This did not seem right to her - nor to many members of the public when this research was publicised. It was largely in response to these revelations that Land Information New Zealand (LINZ), the government department responsible for pastoral lease administration, commissioned a review of rental and tenure review valuation methodologies by a committee of experienced valuers, whose conclusions were published in 2007 and became known as the Armstrong Report.[35] The general gist of that report was that these financial adjustments were proper and defensible, and Ann Brower's calculations, based simply on averages of dollars and acreages, were misleading and unfair. This was based on a consideration of the nature of the rights of lessees and lessors. We shall return to this issue in Parts IX and X.

Dr Brower was also among those concerned that LINZ, a department to which the Commissioner of Crown Lands is attached, was taking a position of neutrality in negotiations rather than one of advocacy on behalf of the Crown and public. LINZ did not consider it to be part of its brief to argue vigorously for the public interest, though its bargaining position was weakened because the runholders were free to walk away from negotiations at any time.

The issue of compensation payments as elements of tenure reviews, is not an environmental one, except in the indirect sense that substantial Crown expenditure makes the whole process less likely to enjoy the support of politicians and public, and, where budgets are limited, means that fewer tenure reviews are achieved as money does not go as far as it otherwise might. Nor is it a legal issue, except in the sense that it raised highly theoretical questions, incapable of final answers, about the nature and quality of the interests of the Crown and lessees.[36] The Armstrong Report, for example, considered who it was who 'owned' significant inherent values (SIVs) on runs. This was a tricky question. We could well think of arguments on both sides. Even the experienced authors of the report could reach no final conclusion on so abstract an issue; they thought that they might belong to the Crown, but that because the Crown has no access to them the SIVs were therefore of no value. That is a debateable, and politically charged, conclusion, but it demonstrates the difficulties of an agreed methodology for valuation of high country lands.

The High Country Accord, representing the interests of lessees, was so angered by Dr Brower's work as to complain formally to Lincoln University and to the Fullbright Foundation. The Accord engaged two Victoria

35 *High Country Pastoral Leases Review 2007; A Review of Pastoral Lease Rental and Tenure Review Valuation Methodologies and Outcomes Associated with Pastoral Lands Throughout the South Island of New Zealand*; prepared at the request of Land Information New Zealand by the review team of D J Armstrong & al, December 2005-October 2007.

36 The precise nature of 'statutory property' has attracted both academic and practical discussion. The precise effect of section 122(1) of the Resource Management Act 1991, for example, which declares that resource consents are neither real nor personal property, is still debated. Matthew Storey, in *Not Of This Earth: The Extraterrestrial Nature of Statutory Property in the 21st Century* (2006) 25 ARELJ 51, recognises at least five sorts of statutory property, although his consideration of pastoral leases is marred by a failure to consider the decision of the High Court of Australia in *Wilson v Anderson* (2002) 213 CLR 401, discussed below. There comes a point, however, where continued theoretical discussion produces diminishing returns, and more value may be derived from Professor Hart's approach of analysis through practical description.

University of Wellington economists who considered that Ann Brower had a 'comprehensive misunderstanding of the leaseholders interest in the land and the economic and valuation principles that underlie ... tenure review agreements'.[37] Part of their argument was of course that a lease conferring exclusive occupation – as leases do – a lease renewable in perpetuity, and for which only a pretty minimal rental was being paid – was little less than a freehold already. The predictable riposte was, of course, that this arrangement was nevertheless a lease, and one where the land could be used for one purpose and one purpose only; and that purpose, indeed, one becoming less sustainable as the degradation of much of the land continued.

Following on from this argument, however, certain issues with a more legal aspect naturally arose. One issue, to be considered in Parts IX and X, was this: if lessees did indeed, as they suggested, have an estate almost as good and as valuable as a freehold, why was this value not reflected in the rent they paid to their landlord, which was calculated as being a certain proportion of the value of the land exclusive of improvements? Another issue was the one we have just been considering: is the perpetually renewable pastoral lease actually a lease at all? If it were only a licence, it would be of much lower value than the lessees claimed.

The argument that a pastoral lease is in fact only a licence which does not confer rights of exclusive occupation on the 'lessee' was resuscitated by Dr Brower and a co-author John Page in a substantial law review article in 2007.[38] The article reiterated at greater length some of the same arguments as had been raised in 1989 by Corry,[39] buttressed by other arguments, although often as much philosophical or political, or even rhetorical, as legal. Their discussion of the implications for public access of a finding that a pastoral lease did not confer exclusive possession on a lessee is, however, vitiated by failure to consider s 176 *Land Act* which, as we have seen, forbids any trespass on the lands of the Crown and which has the potential to restrict public access to the lands in any case.

VIII. The Lease/Licence Issue Finally Decided

The New Zealand Fish and Game Council (Fish and Game) had its own longstanding concerns about fishermen's access to high country lakes and rivers. To address these, it applied to the High Court for a declaratory judgment. Initially two declarations were sought. The first, abandoned at the hearing, was that pastoral leases did not confer exclusive possession or occupation. The second declaration sought was that pastoral leases 'allow[ed] public access to the land … provided such access does not interfere with the exclusive right of pasturage'. Fish and Game accepted that success on the first declaration would not compel the second. Even if the runholders' rights to legal possession were limited, it did not follow members of the public thereby

37 *New Zealand Herald*, 24 January 2007.

38 D Brower and J Page, 'Property Law in the South Island High Country - Statutory, Not Common Law Leases' (2007) 15 *Waikato Law Review* 48 and (2008) 16 *Waikato Law Review* 73.

39 It is not clear whether Corry's earlier work was relied on; he is nowhere mentioned by name.

had rights of access to the Crown's property. Unauthorised access would still be a trespass; and, that being so, even the first declaration, if granted, might be of merely academic interest.

But Simon France J did not grant the second declaration either,[40] holding that rights to exclusive possession were conferred by the pastoral leases:

> It is not just a case of the language used (which is redolent with the terminology of leasing) but the whole substance of the leases established by the Act. The very purpose of these leases is to alienate the land from the Crown, but in circumstances that limit the type of activity that may be carried out on the land. An aim of the leasing exercise is clearly to see the land utilised and improved. The instruments create an interest in land that can be assigned, mortgaged, surrendered or forfeited. The lessee farmer is not just a person authorised to graze but is required to farm the property, to improve it and to keep it pest free. The lessee farmer, subject to very little exception, is entitled to renewals of this lease *forever*, on the same terms and conditions. It is unrealistic to suggest that anything other than legal or exclusive possession is thereby given to the lessee.[41]

His Honour accepted that 'the legislation does things, and uses terms, that are not consistent with classic common law theory, or indeed with an absolute concept of exclusive possession'. He had little doubt, for example, that a pastoral occupation licence, even though it was called a licence, conferred exclusive possession just as a pastoral lease did. The only difference between the two was the (irrelevant) right of renewal.[42]

One of Fish and Game's major points was the many restrictions attached to the lessee's enjoyment of the land. He has only the exclusive right of pasturage and no right to the soil. But these days, said Simon France J,[43] there are very few leases which do not contain reservations and exceptions. He adopted the views of McHugh J, dissenting, in *Western Australia v Ward*:[44]

> [G]enerations of conveyancers … have never doubted that they were creating leases although the instrument of grant contained extensive reservations and exceptions in favour of others … For 300 years leases have demised land and premises for particular uses. Common examples are leases for agricultural, agistment or mining purposes and leases of land or premises for use as an hotel, hospital, crematorium, industrial site or shop. The modern shopping-centre lease almost invariably confines the use of the individual shops to the sale of particular classes of merchandise or the provision of particular services …

Indeed, one New Zealand case,[45] has held that a condition in a lease which obliged a lessee to allow picnic parties and excursionists to land on a beach and remain there for the purposes of picnic or excursion did not undermine the document's status as a lease.

Fish and Game had argued that the lessee's obligation to obtain a recreation permit[46] before being able to use the land for commercial tourism or recreation ventures was evidence of non-exclusive possession. The

40 *New Zealand Fish and Game Council v The Attorney-General* (2009) 10 NZCPR 351 (here after *Fish and Game*).
41 *Fish and Game*, [82] and [83].
42 *Fish and Game*, [54].
43 Ibid [59].
44 (2002) 213 CLR 1.
45 *Whangarei Harbour Board v Nelson* [1930] NZLR 554, referred to in [60].
46 Under s 66A of the *Land Act*, still in force.

defendants replied, more significantly in His Honour's view, that a *third party* can obtain such a permit *only with the lessee's consent*. That consent was indicative of exclusive possession.

Fish and Game had also placed considerable significance on *The Wik Peoples v Queensland*,[47] a decision of the High Court of Australia. The question there was whether a pastoral lease conferred such exclusive possession as to extinguish aboriginal title. A bare majority of the High Court held that it did not. This decision, though, had to be read in its social and physical context. Australian outback farming enterprises are run on different lines from New Zealand high country stations. One of the leases at issue in *Wik* covered 283 000 hectares – almost three quarters of a million acres – and in 1984 ran a grand total – it was estimated – of one thousand head of cattle. By 1988, this had declined to *one hundred* feral cattle; one for every twelve square miles or so. Such a farming arrangement, if it can even be graced with such a name, does not cry out for exclusive possession in the same way as the more intensive pastoralism, in relative terms, of the South Island high country. The Queensland lease did not even involve any obligation on the lessee to reside on the property, as is the case in New Zealand.[48] A Western Australian lease considered in *Western Australia v Ward*[49] which was also considered not to grant exclusive possession, was very much more precarious than a New Zealand lease – the Crown could dispose of any portion of the land under the lease at any time, build roads over it and depasture its own stock; and any person, with or without stock, could pass over any unenclosed parts of the land at any time.

Moreover, in *Wilson v Anderson*,[50] the High Court of Australia, by a 6:1 majority held that a New South Wales pastoral lease *did* confer exclusive possession. Significant features of the lease in that case included its perpetual nature, the lessee's obligations to reside on the property and to make improvements, limitations on the lessee's powers of assignment, and an objective in the lessor of strengthening tenure so as to encourage the availability of finance to the lessee and encourage the productive use of the land. Several of these features appear in New Zealand pastoral leases. The High Court of Australia, then, has most certainly not declared that *all* pastoral leases fail to confer exclusive occupation on lessees. And now the High Court of New Zealand has settled the question here.

IX. Valuations and Rentals

Simon France J in the *Fish and Game* case wisely limited himself to the point at issue, and did not feel obliged to make any general theoretical abstract remarks about the 'nature' of lessees' rights. Over and above a repetition of the statutory provisions, indeed, theorising seems to have little productive value. Dr Brower and the High Country Accord, after all, can come to completely opposite conclusions. Nevertheless, the finding that a

47 (1996) 187 CLR 1.
48 *Land Act*, s 96.
49 (2002) 213 CLR 1.
50 (2002) 213 CLR 401.

pastoral lease is indeed a lease obviously helps to clarify lessees' property rights. They do indeed have a perpetually renewable right to exclusive occupation, and although that might not be quite as good as a freehold, for it is subject to significant limitations on use (as, of course but to a lesser extent, are freeholds, through the operation of such statutes as the *Resource Management Act*) it is nevertheless an undoubtedly valuable interest in that land. That land, moreover, is becoming more valuable. A generation ago high country runs were for the most part simply hard remote farms. They had a certain romantic cachet about them. The respect we have for the pioneers, the rank which some of those pioneers already had or later acquired by their labours, the hardihood, heroism and adventure of high country history, the nostalgia felt by more urban post-war New Zealand for a simpler, purer, somehow more genuine life which seemed still to linger in the hills, the very size and scenery of these stations – all these things contrived to give lessees and their staff a certain rugged glamour. An entire genre of books of high country life and experiences, of which Mona Anderson's *A River Rules My Life*,[51] about life on Mt Algidus station, is merely the best known, made this part of the country familiar, on paper at least, to many of the public. Yet for all that, they were still farms in hard and difficult country. That was reflected in the prices at which they were bought and sold.

These comparatively modest purchase prices, and the modesty of most runholders' incomes, were mirrored in the rentals which were paid to the Crown. The formula for calculating rentals was found from 1948 until 1998 in Part VIII of the *Land Act*. (It is now found in large part in ss 6, 7 and 8 of the CPLA, but those sections refer back to the initial valuation which is still outlined in s 131 of the *Land Act*.) Section 131 requires valuations to be made – of the value of improvements, as they were at the beginning of the lease and as they now are, and of the value of the land exclusive of improvements. Section 131(1)(c)(iii) says that '[t]he sum of the values [of the improvements then existing and of the land exclusive of improvements] shall be equal to the capital value of the land', and 'capital value' is further defined[52] to mean 'the sum which the land and improvements thereon might be expected to realise at the time of valuation if offered for sale …' The Commissioner of Crown Lands has no input into this valuation; he obtains it from a valuer, and from it, in accordance with the CPLA, he calculates the rent. By s 131(4) the rent is to be a certain proportion, usually 2.25%, of 'the value of the land exclusive of improvements'.

We notice immediately that the formula for calculating rent makes no reference whatsoever to the value of the primary production which is derived from that land. It is not expressed as a proportion of the lessee's income. It is a proportion of the value of the land exclusive of improvements.

That formula was appropriate in the days when pastoral leases, however picturesque, were still just hard farms in remote country, and land prices were consequently also low. Now, however, pastoral leases seem to be becoming fashion accessories for some of the world's rich and famous. They

51 M Anderson, *A River Rules My Life* (1963).
52 Section 131(2).

are 'the new black', as Murray Horton of CAFCA (Campaign Against Foreign Control in Aotearoa) calls them. The best-known example is the 2005 purchase of Motutapu and Soho Stations in Central Otago by the singer Shania Twain and her then husband 'Mutt' Lange. For these 24,731 hectares they paid $21.5 million dollars, an amount which by no reasonable stretch of the imagination can be said to reflect the stations' possible income from primary production.[53] Lilybank station, at the head of Lake Tekapo, was notorious for years as the closely guarded preserve of Tommy Suharto, a son of the now overthrown president of Indonesia, who purchased it in 1992 for $2.2 million.[54] Suharto sold his interest to a Singaporean company run by business associates after his father's fall from power and grace, but the purchase price was, officially, just one dollar.[55]

There are other foreign purchases also; but it is not just rich foreigners who pay prices for stations which do not reflect the stations' value for farming. As mentioned above, the Crown has made 'whole property purchases' of five leases. For the 24,000 hectares of Birchwood, at the head of the Ahuriri, it paid about $13 million. For St James Station, a particularly large and scenic run around the headwaters of the North Canterbury Waiau, of great value to trampers, mountaineers, fishermen and hunters, the Crown paid around $40 million. Some runholders, indeed, have been heard to murmur that the Crown's generosity in purchase prices was part of a deliberate policy to inflate land values and thereby rents (in the way to be described below), but that is debatable. There is now an international market for, at least the more picturesque of these leases.

X. The Rental Issue Decided: The *Minaret Station* Decision

If a lease, though, was sold for ten or twenty million dollars or more, it would be fair to assume that the value of the land itself – including improvements, certainly – would also be at least that sum; and since improvements are not usually the greater part of a pastoral lease's value, much of that value would be the unimproved value – the value of the land exclusive of improvements – on which the rent is calculated. In many cases, however, this would result in rents becoming far higher than any runholder could afford to pay. The inevitable result of that would be, in the words of Judge Kellar of the Otago District Land Valuation Tribunal in *Commissioner of Crown Lands v Minaret Station Ltd*[56] that 'the very existence of pastoral leases would be in jeopardy'.

53 See figures in the *Dominion Post*, 14 January 2005. Overseas Investment Commission officials doubted that the two stations would ever be financially viable.

54 Suharto later claimed to be unaware that 25,000 hectares of the 27,526 hectares was at the time of sale already subject to an agreement to surrender it to the Crown. The Crown at times seemed not particularly inclined to enforce its rights, but eventually, thanks in good part to the persistent prodding of Allan Evans, chose to do so.

55 The Lilybank saga has often been told, and can be pieced together from reports in the pages of the *FMC Bulletin* and CAFCA's *Foreign Control Watchdog*, but can be found conveniently summarised in Roberta McIntyre's, *Whose High Country? A History of the South Island High Country of New Zealand* (2008) 337-338.

56 LVP 2/05, 31 July 2009.

At best, a lessee would be forced into tenure review, a process in which he may not have wished to participate, but into which he would be compelled by irresistible economic pressure.

The *Minaret Station* case was a test case. The rental valuation on that property was among the first of a new series of often very much higher valuations which many runholders would indeed have been quite unable to pay. There was a widespread belief among runholders that these high valuations were in fact a backdoor method devised by the then Labour government for forcing runholders into the theoretically voluntary process of tenure review; that it was, therefore, essentially part of a process of seizing private property rights. Magna Carta was occasionally mentioned.

The argument, both before the Land Valuation Tribunal and in more public *fora*, was essentially over what are often called 'amenity values'; the views, privacy, peace and quiet, proximity to lakes, rivers and mountains, and other intangible but deeply-appreciated benefits for which some people are prepared to pay a great deal of money.

Part of the context for this case was set by the 'Beattie Report' of 1968, the Report of a Committee of Investigation into Rentals and Freeholdings of Crown Leases.[57] That Committee dwelt in particular on the valuation of improvements, and spent little time considering pastoral leases. But it recognised as a point of general application that leasehold land could increase substantially in value because of its potential for urban development (this precise situation obviously being less likely in the case of high country pastoral leases) with consequent steep rent increases, and that Parliament ought to protect lessees against this eventuality, as long as the leased rural land was being farmed. Parliament thereafter amended the original s 131 of the *Land Act* to bring it into substantially its present form.[58] That amendment, then, might be supposed to have solved the problem; but the 2007 Armstrong Report came to the conclusion that the rentals already being charged for the most recently reviewed pastoral leases were in excess of market rentals. That report was, of course, one on valuation methodologies; it was not a legal report on the proper interpretation of the statutory provisions. But for all that, it did seem to assume that the Commissioner, in his interpretation of the law in the *Minaret* case, might be right in his interpretation. The report considered that a rental based on the land value exclusive of improvements (LEI) was 'outmoded' and 'no longer relevant in today's circumstances', and proposed an amendment to the Act so as to spell out clearly that rentals would indeed be based on the lease's productive value. It could be calculated by reference to wool returns, numbers of stock units or some similar measure. The report also considered, as mentioned above, that SIVs probably belonged to the Crown; this would mean that they formed part of the LEI on which rental was calculated – although of course the Crown had no access to them, and therefore their true value was debatable.

57 Report submitted to the Minister of Lands on 23 April 1968 by Messrs WR Beattie, JB Brown, Valuer-General and RJ MacLachlan, Director-General of Lands.

58 See the *Land Amendment Acts* of 1968 and 1970.

The Commissioner's argument in the *Minaret Station* case was simple. Rents were to be calculated as a fraction of the value of the land exclusive of improvements. As a matter of logic, and on a literal meaning of the plain words of s 131, the value of the 'amenities' – views, privacy, peace and quiet – was part of the value of the land. Where else could the value of these amenities lie? A valuer was not entitled to 'strip out' these values because they are not connected to pastoral use. It was irrelevant that, in what became almost a slogan of lessees, 'sheep cannot eat scenery'. Many buyers are prepared to pay good money for them, even as part of a lease; they must therefore be part of the value of the land, and since they obviously are not part of the improvements they must be part of the land exclusive of improvements. If that should render some leases economically impossible, that is just because times are changing, and the legislation may therefore be outdated, as the Armstrong Report had suggested; but that is something for Parliament to sort out.

Minaret Station's case was also simple. The lease was a lease for one particular purpose, that of pastoral farming. Valuation of the land should properly be a valuation of the *land for pastoral farming purposes*. Consideration of non-pastoral values – scenery unconsumable by sheep – was not authorised by the statute. The reality was that one land use alone was legally possible, and therefore what was to be assessed was the business opportunity of the land, exclusive of improvements, *for pastoral farming*.

Both approaches are reasonable. If the Tribunal – and the High Court on appeal – had come to the opposite conclusion and found in favour of the Commissioner and higher rents there would of course have been an outcry from runholders and their supporters, but such a decision would have been as equally defensible as the one that was actually reached. A decision the opposite of the actual one would have held merely that legislation drafted in one set of circumstances – low high country land values – had been overtaken by events. The answer was one for Parliament to provide by rewriting the legislation. There can be little doubt that that is what the present Parliament would have done.

At the same time the opposite approach, argued by the lessee and accepted by the Tribunal, was not without justification. Minaret Station argued that legislation should not be interpreted so as to produce an absurd result. The CPLA and the relevant portions of the *Land Act* have as one of their purposes the facilitation of high country farming; that and nothing else, indeed, when lessees have only a right of pasturage. That purpose would be frustrated if rents were so high that pastoral farming became economically impossible. Parliament's words should not be interpreted so as to frustrate Parliament's clear intention. The Tribunal spent nineteen paragraphs considering principles of statutory interpretation. It quoted with approval Lord Shaw's opinion that:[59]

59 *Shannon Realties v Ville de St Michel* [1924] AC 185.

> Where the words of a statute are clear they must of course be followed, but … where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating, and that alternative is to be rejected which will introduce uncertainty, friction or confusion …

and concluded its consideration of principles of interpretation by agreeing with Chadwick LJ in *Victor Chandler International Ltd v Customs and Excise Commissioners*:[60]

> In construing an ongoing Act the interpreter is to assume that Parliament intended the act to be applied in any future time in such a way as to give effect to the true original intention. Accordingly, the interpreter is to make allowances for any relevant changes that have occurred since the Act's passing, in law, social obligations, technology and the meaning of words and other matters.

That approach could indeed justify the Tribunal's decision. The Tribunal also relied on provisos to s 131 requiring values to be ascertained 'on an equitable basis'. It drew support from a provision in s 8 of the CPLA that rental value was not to include 'any value that the land may have for subdivision for building purposes or for commercial or industrial use', although that does not cover the lifestyle amenity value point directly. It also made the point that if lifestyle purchasers knew that they would have to pay high rentals as the Commissioner intended, then purchase prices might not have been so high.[61]

Let us note, incidentally, that any valuation of the land exclusive of improvements can serve more than one purpose. A valuation must be used for the calculation of rentals when a pastoral lease is ongoing. It will also be considered should tenure review occur, and payments are to be made to or by the lessee under s 46(4) of the CPLA. It is, obviously, in a lessee's interest to have the LEI as low as possible when rents are being calculated. Intangible 'amenity values' which might make the land attractive to non-farmers should be ignored. But when a tenure review is occurring, and one party is compensating the other for the excess of value taken, then a lessee may well want those amenity values to be included, because they are likely to be greater in the parts of the run which he is surrendering to the Crown. When a lessee sells his lease, too, he hopes and expects that the purchaser will be very aware of the amenity values. A proverb about eating cake comes to mind. Either valuation will sometimes be advantageous for a lessee, sometimes disadvantageous.

The Land Valuation Tribunal upheld Minaret Station's claim. Valuations should be on the basis of the land *as used for pastoral purposes* exclusive of improvements. But that conclusion, arrived at after much very detailed discussion, does not arise absolutely inevitably from the provisions of the legislation. The Commissioner's case was also a very reasonable one.

60 [2000] 1 WLR 1296.

61 A second argument was also considered by the Tribunal at some length; whether in fact there was a market for such runs apart from their pastoral value, or did even 'wealthy individuals who buy for lifestyle reasons also expect to run the pastoral farm in a businesslike manner'? There was much discussion on this point. Some evidence had been produced that for some buyers 'the pastoral productive capacity … was a distant third in order of priority of reasons for purchase …' However the Tribunal was inclined to think that in most cases even wealthy buyers would prefer a return on their investment.

The Crown has since decided to appeal against what it terms 'a narrow component' of the decision.[62] The owners of Minaret Station have nevertheless declared that they 'take comfort' from recent Ministerial statements suggesting that the present government is not revisiting the policy of the previous government, and the appeal in fact only seeks clarification.

XI. The Suggestions of the Parliamentary Commissioner for the Environment

Legally, as well as politically, then, the position of pastoral lessees has very recently been consolidated. It is now clear that they are indeed lessees and not mere licensees. Subject to the outcome of the *Minaret* appeal, we can say that those lessees not wishing to enter tenure review are not going to be forced to do so by impossibly high rentals. The present National government shows no signs of wishing to amend the CPLA – enacted, of course, under a previous National administration. It has done away with the legally dubious policy of refusing to consider tenure review of lakeside properties. Tenure review is therefore open to all.

At the same time, not only the government but also the Parliamentary Commissioner for the Environment has raised the possibility that the Department of Conservation already has 'enough' land in the high country – more, possibly, it is suggested, than it can already look after. The Commissioner's report, *Change in the High Country: Environmental Stewardship and Tenure Review*[63] expresses doubts about the wisdom of establishing further high country conservation parks in addition to the eleven already in existence, two more already gazetted and three more proposed. The Commissioner agrees that it is important that the high country park network 'contain[s] a full range of large scale landscape/ecology', but believes that that can be achieved without completing the proposed park network. She makes several other points:

1. The public interest in much of the high country pastoral lease land goes beyond the Department of Conservation's chief functions … which centre on maintaining and conserving natural and historic resources. Ecosystem services that could be provided by such land, such as soil conservation, water yield and carbon storage, do not necessarily require ownership and management by DoC.
2. Moreover much of this land has some potential for productive use. It may be preferable for some high country conservation land that has relatively low conservation values to be managed for multiple uses, or even disposed of in order to fund other acquisitions.
3. At a national level, conservation parks are being oversupplied in one part of the country. Twenty parks in the rain shadow of the Southern Alps is simply not a good use of limited conservation resources. Of course it is only in the South Island high country that such large areas of land are being made available for DoC acquisition. But our public conservation land should not be so dominated by dry high altitude pastoral land in one part of the country. The imbalance between conservation lands in the South Island and those in the more populous North is becoming very marked … The case for nationwide strategic planning for conservation land is increasingly compelling.[64]

62 High Country Accord press release 21 August 2009.
63 Parliamentary Commissioner for the Environment, April 2009.
64 These three recommendations may be found in Chapter 4, Recommendation 4.5.

In reply to the last point it could well be argued that by the very nature of things conservation lands are likely to be situated at a distance from more populous areas. Conservation lands tend of their nature to be lands left unwanted and unsettled by human beings. The Commissioner is right, though, that there are many calls on the Department's limited funds. It may be the case at present that some, although certainly not all, high country land ends up as conservation land not so much because it has particularly high conservation values as because it is 'unproductive' and just has to go somewhere. But where else is it to go? The Parliamentary Commissioner suggests briefly that:[65]

> rather than trying to 'shoehorn' [land with neither pastoral nor conservation value] into one box or the other, it may be appropriate to search for other solutions. This may involve transferring it to local authorities and managing it for environmental purposes such as clean water yield, soil conservation or carbon storage.

Yet carbon storage could be argued to be a national rather than regional responsibility, and local bodies are likely to be as hard-pressed financially as the Department and as reluctant to assume new burdens. The Parliamentary Commissioner in fact recommends that that remarkable word 'preferably' be removed from s 24(b)(i) of the CPLA. That change, however, would not put these lands into the hands of local authorities.

No mechanism exists in New Zealand law to allow any 'right to roam' over the land of unwilling private landowners. The recently-created Walking Access Commission has only the power to negotiate with landowners, who always have the final say, and that is as it should be. Public recreational access to pastoral lease or freeholded land may sometimes be unavailable, then, whereas it would be available were that land in the public conservation estate. That would certainly be a pity. Nevertheless, as has been made clear in the *Fish and Game* decision, there is no public access as of right to pastoral lease land now. If, in hard times, scarce Conservation Department funding should go to more pressing causes than the maintenance of high country parks, and if, as conservationist opposition to tenure review suggests, secure private tenure of the high country is not necessarily destructive as previously alleged, continued pastoral lease tenure, or freeholding *with protective mechanisms*, might not make all that much difference. Freeholding with, say, ensuing dairy farm development would of course be another story.

XII. The Inescapable and Unanswered Question

But we return to the conundrum. What do we do with lands which may have been declining in quality under the pastoralism of the past – assuming that the Martin Report was quite correct, and conservationist opposition to tenure review motivated by socialism rather than environmentalism – but where little other productive use is possible? Runholders will be able to keep more of their runs as freehold if the word 'preferably' were to go, but runholders may not necessarily want these areas, or be able to do much with them even if they have them. Most of these areas will have some natural values. As long

65 Recommendation 4.4.

as tenure review continues then some, at least, of these lands will continue to come the Crown's way. The conservation estate is surely as good a place to put them as anywhere else. In order to stop these lands coming to the Crown, the options are to abolish tenure review or, in the Parliamentary Commissioner's words, 'to direct the Commissioner of Crown Lands to encourage and adopt a wider range of land ownership and management models within tenure review proposals' after 'preferably' disappears.[66] At the time of writing, it seems possible that the tenure review of one run will result in an almost complete freeholding subject to 'protective mechanisms'. At present the law provides for fines, stock limitations and even forfeiture of lease. Financial incentives, the Parliamentary Commissioner suggests, could also be provided to lessees 'for the provision of environmental services in the future'. She clearly has in mind the possibility of relieving runholders from some of their rental burden as a reward for superior stewardship. That idea has been in quite a few minds. Professor David Norton of the University of Canterbury is among the most prominent advocates of sustainable management covenants for whole properties, arguing that land management is more important than land tenure in maintaining biodiversity. He points out that while some native plants – the native brooms, *Carmichaelia spp*, for example – do better without grazing, many native herb species benefit from grazing since they are more vulnerable to competition. He argues that simply dividing the high country into areas of farmland and conservation estate was:[67]

> too narrow to produce a durable solution … It was likely the current process would result in an increase in invasive plant species in conservation areas, loss of biodiversity on freehold land through intensification of land use, and a loss of landscape connection affecting overall biodiversity … Many … high country systems have almost certainly crossed thresholds of change that will be very difficult to reverse: simply removing degrading factors alone will not lead to most of the high country regenerating back towards Hall's totara forest for example – this is not going to happen.

But after the *Minaret* decision, reduction of rents from an otherwise high level in return for superior stewardship by lessees is no longer an option. Such incentives, in any case, would still cost money; even rent reductions are a loss of income to the Crown. One way or another, the public still bears the burden. It is not avoided just because the land does not enter the conservation estate.

In all these arguments the conservation and outdoor recreation movement has been notable in not speaking with one voice. It has, indeed, been in disarray. Although the Royal Forest and Bird Protection Society, New Zealand's premier conservation organisation, remains officially committed to tenure review, even it harbours dissenting voices; and a new organisation called Stop Tenure Review,[68] enjoying the support or sympathy of not a few conservationists, insists that tenure review is 'a travesty of justice and an

66 Recommendation 4.3.5.

67 David Norton, 'Managing HighCountry Landscapes into the Future' in R Lough (ed), *High Country Landscape Management Forum*, 12 - 13 September 2005, Queenstown: Proceedings, 97-103; quoted in R McIntyre, *Whose High Country?*

68 Website <http://www.stoptenurereview.co.nz> accessed 2 February 2010.

environmental disaster'. Stop Tenure Review repeats Dr Brower's arguments in its analysis of the rights of lessees, Crown and public. It is concerned about 'social justice', and refers to Dr Brower's researches on payments to lessees and such threats as 'expensive holiday homes', lifestyle blocks, vineyards and resorts. Like the painter Grahame Sydney and landscape architects such as Di Lucas, it is dismayed by 'the change from semi-natural cover to vividly green square or round paddocks'.[69] Stop Tenure Review urges a policy of abolishing tenure review completely, increasing rentals, stopping discretionary consents (for burning, ploughing, sowing, etc), purchasing 'grazing rights' from lessees and 'managing for a sustainable future' in which human use and economic production seem to have very little place. If even the first two of those policies – stopping tenure review and increasing rentals – were implemented, pastoralism would immediately become completely unprofitable, and lessees would be unable to do anything with their runs except abandon them. The ideological absolutism of such a proposal may be satisfying, but its disappointing political naivety guarantees its irrelevance.

Other organisations, such as Federated Mountain Clubs (whose chief interest is outdoor recreation, but such recreation in wild places), correctly consider such policies as Stop Tenure Review proposes to be completely unrealistic.[70] They argue that tenure review is an exchange of rights, and that it was always envisaged as part of the bargain that lessees would be free to pursue other land uses besides pastoralism. Other land uses were indeed part of the plan. There may be changes, and some may well be for the worse, but they are not all automatically bad, and in any case change is something that happens, even in the high country. The Parliamentary Commissioner, after all, agrees that much good has come out of tenure review. Although she accepts that 'there is no justification for completing individual reviews where the public interest is not protected adequately', nevertheless she also considers that 'refinements' to the process have improved it, and that to abandon it now would be wasteful of much work and stressful for lessees.

The central issue facing nearly all of the high country – not just that area still under pastoral lease – is not a legal but a physical and philosophical one: how is the land to be 'managed'? Can it be put to productive human uses, and if so what, or is it fit only to be left alone? Even if it can be used productively, to what extent should it be? The land's history over the last century and a half has been one of a gradual learning of nature's laws. There was no human experience to guide the squatters, and so they made many mistakes. It might be that we shall learn in the end that in much of this country sustainable land management for human use is too troublesome and expensive to be possible or at least worthwhile. Perhaps we have not yet heard the last reverberations of David McLeod's prophecy; when the Soil Conservation Council was established under the *Soil Conservation and Rivers Control Act* he said to his wife 'They are going to find out a great deal more than is healthy for our welfare'.[71] It would be sad if that were to happen. The result would not simply

69 Press release, Di Lucas, High Country Landscape Group, 20 October 2003.

70 See, for example, D J Round, 'High Country Tenure Review', *FMC Bulletin 167*, March 2007, 12-15.

71 *Down from The Tussock Ranges*, 39.

be a return of pre-European vegetation; in many places the dominant plants in the foreseeable future would be broom, wilding pines and sweet briar. It is easy to over-romanticise this country, but in an increasingly frantic and desperate world it still seems a place where human beings live close to nature and work within nature's cycles. Here in the hills an old New Zealand dream lost in our cities still lingers, of healthy, decent and useful life in a coherent community. The life of a high country shepherd, Samuel Butler said, was 'a kind of mixture of that of a dog and that of an emperor'.[72] It involved dirt, drudgery, danger and exhaustion, but with an incomparable freedom and exultation in a glorious beauty and vigorous life. It will be the worse for our country when young people no longer dream of striding the hills. It is that same love that moves many conservationists to preserve these precious places from degradation, development and final privatisation. It is sad that recent debates have aroused divisions and hatreds among people of goodwill whose real hopes for the future are perhaps not all that far apart.

We command nature, Bacon said, by obeying her laws. In the hard high country, retribution follows disobedience more swiftly than elsewhere. Our knowledge of this land has grown immeasurably, but we cannot be certain we now know enough. Perhaps we do, but there may still be important things we do not know or realise. How can we know that there are things we do not know? The high country's situation is not the same as that of our native forests, which largely need only to be left alone to survive or regenerate. We have entered and altered this country. We have established houses and farms, livelihoods and lives. We have disrupted the original ecosystems. They will not automatically return, even if such a return were politically possible. Now that we have taken possession of this country, it is our responsibility for ever.

A solution to high country land management problems that is politically, socially, economically and environmentally acceptable to all seems far away. In retrospect the era of the 1948 *Land Act* seems almost a golden age of certainty and harmony. It seems pretty certain that tenure review will continue for the time being. More land may possibly pass to lessees as freehold, quite possibly under 'protective mechanisms', than heretofore. That will not please environmental and recreation advocates. It is difficult to imagine, though, whatever the future tenure may be, that much of this country will alter very much. As long as a few basic rules are applied, to prevent burning and overstocking and to control weeds, simple physical and economic constraints will see to that. Sheep are declining. International tourism cannot be practised everywhere, and given the future absence of cheap oil, tourism is in any case a sunset industry. It may be that landholders, either present lessees or future freeholders, may find some of their lands to be more trouble than they are worth. Whenever land becomes an economic liability then inevitably the private owner will disappear, and the land become a public responsibility. The high country is fragile, and any failure

72 Samuel Butler, *A First Year in Canterbury Settlement*, ch 4 (first published in 1863). The citation is from the 1964 edition by A C Brassington and P B Maling, Blackwood and Janet Paul, 48-9.

of sustainable and economically profitable land management will have the certain result that that land becomes, in one way or another, a public burden. We are still in the middle of a great experiment.

And yet high country issues, for all their difficulty, are simpler than those of the peopled lowlands. If we fail in the hills, what hopes may we have of resolving the greater tangles of the low country? The hills are not only a challenge but also a warning.