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# PART 2:

# PROPERTY RIGHTS



# Chapter 5

## Regulatory Reform and Property Rights in New Zealand

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### 5.1 Introduction

This chapter considers the regulatory reform issues associated with the current constitutional and legal framework for property rights, with an emphasis on real property rights or interests in land. At [5.1.1] we consider the origins and various forms of title to land in New Zealand, and the protections from confiscation afforded those possessing titles to land. We point out that protections here are strong, although there are established precedents for state nationalisation of elements that would be associated with those titles under common law. At [5.1.2] we extend our consideration to the different use rights that are associated with legal possession of title to property, focusing on “property rights” that provide the right to use resources for certain purposes. Here we suggest that it is appropriate to consider regulatory reform which would constrain government action that impairs the value of certain rights to the use of property without acquiring title. Our conclusion provides suggestions on the scope of the work programme that may be pursued, and the benefits that it may provide.

#### 5.1.1 *Property and the New Zealand constitutional framework*

In this part of the chapter we analyse the key features of the relationship between “regulatory reform” and – for lack of a better term – the relationship between property and New Zealand’s existing constitutional and legal

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framework. In order to illustrate this framework most clearly our emphasis is on real property rights, that is, land or interests in land.

Before proceeding further it is necessary to clarify the principal categories of land in New Zealand, this being basic to any discussion of regulatory reform. The main categories of land are “general land”, Crown land, Māori freehold land and Māori customary land. The most recent and authoritative definition of these various categories is currently found in s 129 of the Māori Land Act/Te Ture Whenua Māori 1993 (TTWM).

“General land” is defined in TTWM s 129(2) as “land (other than Māori freehold land and General land owned by Māori) that has been alienated from the Crown for a subsisting estate in fee simple”. This is a very accurate definition, as it makes it clear that all private titles in New Zealand derive from a Crown grant – and of course in New Zealand such grants are not “lost”, as they typically are in English law, but can be readily located. Crown land, which is about half the country, is defined as “land ... that has not been alienated from the Crown for a subsisting estate in fee simple”. Basic to both definitions is the notion that the surface area of New Zealand as at the acquisition of Crown sovereignty was held by Māori under Māori customary law: this title had to be extinguished, by purchase or by some other means, before the Crown could acquire a proprietary title to it, or grant it.

What, then, are the patterns of land ownership and land tenure as they are both structured at present in New Zealand? How do these patterns relate to our broader economic and political framework, and what are the historical origins of what we see about us today? Strangely these questions, which have received great attention in (for instance) Central America, have not received very much attention in New Zealand to date. There are a number of excellent legal texts which deal with our existing land law, and there are also some solid works of environmental history, but these works do not really grapple with the bigger and more fundamental questions of the relationships between property, economics and politics in which we are interested. So here we can do little more than indicate in a general way what seem to be the distinctive features of New Zealand in these respects.

Three aspects of land tenure and land ownership appear to particularly stand out in contemporary New Zealand: the very high levels of state participation in the direct ownership of land and resources; the importance of the family-owned farm, both statistically and ideologically; and the existence of a separate category of land, Māori freehold land, which has no exact equivalent anywhere else.

New Zealand covers an area of 268,680 square kilometres, making the country a bit smaller than Italy (301,277 sq km) or a bit larger than the United Kingdom (244,820 sq km). A high percentage of the land is in direct Crown ownership, and indeed no less than eight million hectares (80,000 sq km) or 30 per cent of the entire land mass of the country is vested in and managed by the Department of Conservation, New Zealand’s largest landowner by far.

Other categories of Crown land bring the total up to around 50 per cent. About 5.6 per cent of the country, or 1,515,071 ha, is Māori freehold land, but this is not evenly spread around the country, and there is only 71,629 ha of Māori freehold land in the South Island today, barely 0.4 per cent of the South Island. The Māori Land Court today does conduct sittings in the South Island, but it rarely has much business there. For all practical purposes 0.4 per cent is equivalent to “none” – a major tenurial difference between the two islands which goes strangely unremarked upon, given added significance by the fact that the South Island is considerably larger than the North. The heaviest concentrations of Māori freehold land are found in the Waiariki (Taupo-Rotorua), Aotea (Taranaki-Whanganui) and Tairawhati (Gisborne-East Coast regions), where over 20 per cent of the land in each region (measured by Māori Land Court district) is Māori freehold land today: 22 per cent in Waiariki and around 26 per cent in Aotea and Tairawhiti. What is not Crown land or Māori freehold land is what is termed “general land” in New Zealand property law, or land held on private title, this constitutes about 45 per cent of the country.

The legal framework relating to land or interests in land in New Zealand has, in our opinion, the following principal characteristics:

- a. The absence of a formal constitutional protection of property rights;
- b. Strong protection of private property rights in land, partly deriving from the common law, but more particularly by means of the “Torrens system”, currently implemented by the Land Transfer Act 1952;
- c. A countervailing tradition of partial protection of access to the countryside and rural areas by means of the Queen’s chain (marginal strips), Crown/public ownership of the foreshore and seabed, and an elaborate system of national parks and other protected public lands;
- d. Cheap and efficient conveyancing and highly effective state guarantee of private titles;
- e. A strong and well-developed law of compensation for public works takings, notwithstanding the absence of formal constitutional protection of property rights;
- f. A strong system of zoning laws, and a corresponding lack of clarity about the acceptable impacts of regulatory control over land (as opposed to direct takings for public works);
- g. A high degree of nationalisation of basic resources (development rights with respect to natural water, geothermal energy, petroleum etc.);
- h. A significant part of the country held under a unique form of tenure with no counterparts in other developed countries (Māori freehold land, which makes up about 12 per cent of the surface area of the North Island);
- i. A significant percentage of the surface area of the country held directly by the Crown (about 50 per cent of the land mass of the country), most set aside for conservation purposes; and

- j. A degree of persistent confusion about the scope and consequences of Māori customary rights under the Treaty of Waitangi and the common law doctrine of aboriginal title.

The above combination of circumstances is unique to this country. In our view, any attempt at regulatory reform has to engage with these realities of the New Zealand system of property rights and property law. We will now consider, in turn, each of the points listed above.

*Absence of formal (that is, constitutionalised) protection of property rights:*

It is elementary that New Zealand lacks a basic constitutional protection of property rights, such as (for instance) the takings clause of the Fifth Amendment of the United States Constitution. Another country without formal constitutional protection of property is Canada.<sup>1</sup> One possible option for New Zealand is to establish some kind of formal constitutional protection for property rights. As New Zealand does not actually have a core document that we could call a “written constitution”, any such protection would have to be incorporated into some other higher-level statute, perhaps into the New Zealand Bill of Rights Act 1990. In 2011 the Regulatory Standards Bill was introduced in Parliament.<sup>2</sup> It provides a series of “principles of responsible regulation and their effect”, including, about the taking of property that legislation should:<sup>3</sup>

... not take or impair, or authorise the taking or impairment of, property without the consent of the owner unless—

- (i) the taking or impairment is necessary in the public interest; and
- (ii) full compensation for the taking or impairment is provided to the owner; and
- (iii) that compensation is provided, to the extent practicable, by or on behalf of the persons who obtain the benefit of the taking or impairment.

The Regulatory Standards Bill provides that the Minister responsible for any Bill, and the chief executive of the relevant public entity, must provide a certificate of compliance with this and the other principles of regulation.<sup>4</sup>

*Strong protection of private property rights in land:* Notwithstanding the absence of formal constitutional protection, it is certainly a mistake to imagine

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<sup>1</sup> As a companion to this chapter, the next (ch 6) discusses the Canadian law and makes some comparisons to New Zealand law; see Russell Brown “Possibilities and Pitfalls of Comparative Analysis of Property Rights Protections, and the Canadian Regime of Legal Protection Against Takings” in this volume (ch 6).

<sup>2</sup> Regulatory Standards Bill 2011 (277-1).

<sup>3</sup> Regulatory Standards Bill 2011 (277-1), cl 7(1)(c).

<sup>4</sup> Regulatory Standards Bill 2011 (277-1), cl 8. See also discussion in Dean Knight and Rayner Thwaites “Review and Appeal of Regulatory Decisions: The Tension between Supervision and Performance” and Derek Gill “Regulatory Management in New Zealand: What, Why and How?” both in this volume (ch 8 and ch 7, respectively).

that New Zealanders are unconcerned about private property rights in land, or that such rights are not well-entrenched in New Zealand law. The latter is achieved by two main methods. First, New Zealand is a common law country, and is heir to English-law traditions of strict protection of property rights in land and interests in land by common law devices such as actions in trespass. Probably more importantly, New Zealand is a leading “Torrens” jurisdiction, first pioneered in South Australia by the radical reformer Robert Torrens and effectively implemented in New Zealand by the Land Transfer Act 1870.<sup>5</sup> Virtually all private titles to land in New Zealand (about 45 per cent of the surface area is owned privately) are fully covered by the system, now governed by the Land Transfer Act 1952. The system amounts essentially to a state guarantee of title to holders of estates in land as defined by surveys and marked out on the land by survey pegs positioned on property boundaries. The legislation abolished common law actions in ejectment and for the recovery of land. Current registered proprietors have an effectively unchallengeable title. The legislation also changed the law relating to common law mortgages by providing that mortgagees have only a charge on the land, but nevertheless implemented a highly effective system of protecting the rights of lenders by means of a right to mortgagee sales. The private housing market and the rural land markets in New Zealand, which both have high rates of turnover, are underpinned by this legislation which works comparatively well. (It is not perfect, needless to say – but in our view it does not need a major overhaul.)

*A countervailing principle of protection of public rights of access to the countryside, beaches etc.* On the other hand, there is also in New Zealand an established right of access to the countryside, albeit one that has taken distinctively New Zealand forms. New Zealand lacks any equivalent to the concept found in Swedish common law of a general right of public access to privately owned rural land. Nor is there any counterpart to the vast network of public rights of way and pathways found in Britain. What New Zealand does have, however, is the concept of the “Queen’s chain” or “marginal strips”: areas of land in public ownership around the margins of lakes, the foreshore and rivers deriving from the Land Act 1892 and taking the form of reservations of land in Crown title in Crown grants.<sup>6</sup> Such areas were post-1892 not actually

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<sup>5</sup> See, generally, Douglas J Whalan “The origins of the Torrens system and its introduction into New Zealand, in GW Hinde (ed) *The New Zealand Torrens System: Centennial Essays* (Butterworths, Wellington, 1971) at 1; David P Grinlinton (ed) *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003). On the core principles of Torrens systems, see especially S Rowton Simpson *Land Law and Registration* (Cambridge University Press, Cambridge, 1976).

<sup>6</sup> The Land Act 1892, s 110 stipulated that in all sales or dispositions of Crown land a strip of land 66 feet wide (now 20 m) was to be reserved around the sea coast, the margins of all lakes exceeding 50 acres, and along the banks of all rivers and streams more than 33 feet wide. This provision became in turn s 58 of the Land Act 1948. The current law relating to marginal strips is now set out in the Conservation Act 1987 as amended by the

included in the Crown grant and thus remain in public ownership. These strips are currently managed by the Department of Conservation, although it is almost impossible to know definitely where all of these strips are or their combined acreage. In addition, New Zealanders have long worked on the assumption that the foreshore and seabed was publicly owned, which explains the continuing consternation relating to the foreshore and seabed issue and the finding of the Court of Appeal in 2003 that Māori customary rights in the foreshore and seabed could still be asserted.<sup>7</sup>

*Cheap and efficient conveyancing and state guarantee of titles:* This is achieved by the Land Transfer legislation, already referred to above. New Zealanders find the system of private title insurance and the continued use of actions in ejectment (as, for instance, in the state of New York) difficult to comprehend, and are puzzled too by the use of notaries to record private titles that typifies Civil Law countries. In New Zealand titles are guaranteed by the state. Conveyancing is comparatively easy, uncomplicated, and very effective. New Zealand shares this feature with other leading Torrens jurisdictions (for example New South Wales and Victoria). However the position of Māori freehold land, described below, is something of an anomaly.

*Strong protection of landowners with respect to clear takings of private property for public purposes:* As in other Western countries both the state and local authorities, as well as some other entities, can take land in private title for public purposes. Rights of landowners to full compensation are protected under the Public Works Act 1982. This Act, however, no longer lists the purposes for which land may be taken – this is left to a rather diverse and heterogeneous range of other statutes – and arguably this does need to be clarified. There is also an argument that too many types of public authorities

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Conservation Law Reform Act 1990, which inserted Part 4A into the 1987 Act. Marginal strips are not access rights over private land but rather a category of Crown land (meaning the land was not Crown-granted in the first place). Some strips may originate from pre-1892 surveys, especially in Otago and Canterbury, but this is difficult to establish clearly.

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The decision referred to is of course the Court of Appeal decision in *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA). In *Ngati Apa* the Court of Appeal overruled its own earlier decision in *Re Ninety-Mile Beach* [1963] NZLR 461 (CA) and held that Māori customary title to the foreshore and seabed has not been extinguished by any *general* enactment. The case was a straightforward application of ordinary Native title law and it remains hard to understand why the government was (apparently) taken by surprise by the decision. This decision led ultimately to the enactment of the Foreshore and Seabed Act 2004. See generally Richard Boast *Foreshore and Seabed* (LexisNexis, Wellington, 2005); Claire Charters and Andrew Erueti (eds) *Māori Property Rights and the Foreshore and Seabed: the Last Frontier* (Victoria University Press, Wellington, 2007). Along with Sir Tahakurei Durie and Hana O'Regan, Richard Boast was a member of a panel appointed in 2009 by the Attorney-General, Christopher Finlayson, to review the 2004 Act. The panel recommended the repeal of the 2004 Act, one reason being that it had simply been unsuccessful: no orders had been made under it by either the Māori Land Court or the High Court. The review is available at Christopher Finlayson and Pita Sharples "Foreshore and Seabed Act review received" (2009) New Zealand Government [www.beehive.govt.nz/release/foreshore-and-seabed-act-review-received](http://www.beehive.govt.nz/release/foreshore-and-seabed-act-review-received) (last accessed 18 August 2011).

have the right to take land for public purposes. Nevertheless, on the whole, rights of compensation at full market values are strictly protected and the rights of landowners to challenge valuations are also well-established.

*Strong zoning laws and a lack of conceptual clarity about the acceptable limits of environmental regulation:* In 1991 the Resource Management Act was enacted, which consolidated and expanded the law relating to town and country planning, air pollution, coastal planning, and allocation of rights to surface, subsurface and geothermal water. The Resource Management Act 1991 is a pivotal statute, which – along with the Land Transfer Act 1952 – is one of the two most important statutes to the practising property lawyer. It is in this area that there can be made the clearest case for a reform of the existing law by providing for some kind of formal definition of the acceptable limits of non-compensable regulation of landowners under the guise of environmental regulation. How much control should landowners be expected to put up without compensation? This is the area that “takings” jurisprudence with which the United States is most concerned.<sup>8</sup> There is certainly scope for

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<sup>8</sup> The case law and commentary on “takings” in the United States is much too vast to cite here. The basis is the “takings” clause of the Fifth Amendment: “... nor shall private property be taken for public use, without just compensation”: US Const, am 5. This is a basic common law principle and is reflected also in our Public Works Act 1981. Direct takings are not really the issue: the more difficult question is the permissible scope of amenity and environmental controls. The interpretation of the takings clause became a matter of crucial significance in the United States as a result of Justice Holmes’ decision in the United States Supreme Court case *Pennsylvania Coal Co v Mahon* 260 US 393 (1922) at 415, where he famously observed that “[t]he general rule, at least, is that, while property may be regulated to a certain extent, if regulation goes too far, it will be regarded as a taking.” The case is equally famous for Justice Brandeis’ dissent, on which advocates of strict land use controls have relied ever since. In United States law today, to state the matter rather baldly, regulation of land within certain limits is an exercise of the “police power”, and no compensation is required; but if the regulation crosses these limits, it becomes an exercise of the “eminent domain” power, and is invalid if “just compensation” is unavailable. The vital question of determining where these limits lie has vexed courts and commentators ever since, and has led to the production of large numbers of judicial opinions and learned articles and books. American law is thus characterised by an almost excessive fixation on the constitutional limits of land use control, and the contrast with New Zealand in this respect could hardly be more pronounced.

In Britain the issue does not arise in the same manner due to the very different structure of town and country planning law there. In Britain the issue of the proper limits of land use control has been explored in detail in a number of pivotal reports, of which the most important was the well-known *Expert Committee on Compensation and Betterment: Final Report*: Augustus Uthwatt and others *Expert Committee on Compensation and Betterment: Final Report* (HMSO, London, 1942). This was one of a great series of reports, the others being the Scott, Abercrombie, Reith, Dower and Hobhouse Reports which preceded the post-War legislation which created the modern planning system in Britain: John Scott *The Administration of War Production* (HMSO, London, 1955); Patrick Abercrombie *Greater London Plan 1944* (HMSO, London, 1945); John Charles Walsham Reith and others *Final Report of the New Towns Committee* (HMSO, London, 1946); John G Dower *National Parks in England and Wales* (HMSO, London, 1945); Arthur Hobhouse and others *Report of the*

further work on how serious, practically, the problem is in New Zealand, and whether United States solutions, if they are solutions, are something we should best emulate or avoid.

*A high level of nationalisation of basic resources.* This too is a basic feature of the New Zealand legal and political system, perhaps somewhat cutting across the strong protection of property rights at common law and under the Land Transfer system. Such nationalisation has been characteristic for a surprisingly long time. The process began as early as 1903 with an amendment to the Coal-mines Act which dealt with the issue of coal ownership beneath the bed of the Waikato river by going to the perhaps extraordinary length of vesting the beds of all “navigable” rivers in the Crown.<sup>9</sup> The exact meaning of this phrase has been a constant problem which has not been successfully resolved by the courts and which is soon to receive the scrutiny of the Supreme Court, and certainly is something that deserves regulatory reform if anything does. Also in 1903, the Water-power Act took the first steps towards state control of development rights in water, particularly for the purposes of electricity generation.

A further expropriation came with the Petroleum Act 1937 which – without compensation – vested all petroleum, which includes natural gas, in the Crown. This is still the law.<sup>10</sup> It is perhaps tempting to see this legislation as socialism run riot, given the fact that it was enacted by the comparatively radical Labour government that took power in 1935, but in fact the legislation was based on British precedent and was supported by the petroleum industry – oil companies prefer to deal with governments rather than with multifarious landowners. Other resources that have been nationalised are gold and silver, uranium, geothermal resources, and all development rights relating to natural water. These nationalisations were given effect by a series of statutes, including the Geothermal Energy Act 1953<sup>11</sup> and the Water and Soil

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*Committee on Footpaths and Access to the Countryside* (HMSO, London, 1947). The most important enactment was the Town and Country Planning Act 1947 (UK). Other enactments included the Distribution of Industry Act 1945 (UK), the New Towns Act 1946 (UK), and the National Parks and Access to the Countryside Act 1949 (UK). Uthwatt’s report advocated the nationalisation of all development rights by the state with a right to compensation, and this was implemented to a large extent by the Town and Country Planning Act 1947 (UK).

<sup>9</sup> Coal-mines Act Amendment Act 1903, s 14. This was enacted in response to the decision of the Court of Appeal in *Mueller v Taupiri Coal-Mines Ltd* (1900) 20 NZLR 89 (CA). The provision was continued in s 206 of the Coal-mines Act 1925 and s 261 of the Coal Mines Act 1979. Although the provision is now technically repealed it lives on as a consequence of s 354(1)(c) of the Resource Management Act 1991.

<sup>10</sup> Crown Minerals Act 1991, s 10.

<sup>11</sup> Section 3(1) of the Geothermal Energy Act 1953 vested in the Crown the sole right to “tap, take, use and apply” geothermal energy. Users of the resource other than the state required a licence from the Minister of Works. Today geothermal resources are treated as a water resource and are regulated by regional councils under the Resource Management Act 1991. By s 2 of the Resource Management Act “water” is defined to include

Conservation Act 1967, and are now embedded in s 10 of the Crown Minerals Act 1991<sup>12</sup> and s 354 of the Resource Management Act 1991. Not all minerals have been nationalised by any means; a considerable amount of the nation's coal reserves, for instance, are still privately owned. Mineral ownership in New Zealand is amazingly intricate – a complex patchwork – and could certainly do with some clarification.

New Zealanders, it seems, believe in strong property rights protection for houses and farms, but are less troubled by state nationalisation of energy resources, water and minerals. Generally resources have been nationalised once the state realised their significance, especially in the energy field. Geothermal resources were nationalised when the state realised the possibility that they could be used for the generation of electricity; following nationalisation the New Zealand government went ahead and built one of the first large-scale geothermal power stations in the world (at Wairakei). Arguably the Foreshore and Seabed Act 2004 can also be seen as a nationalisation of a resource once the state became aware of its value, but this has of course proved to be far more controversial.<sup>13</sup>

*A type of land tenure that is unique to New Zealand.* Here we are referring principally to Māori freehold land, which is an important category of land in this country and which has no exact counterpart anywhere else. “Māori freehold land” is a term of art in New Zealand law, and certainly does not mean land owned in freehold title by people of Māori ethnicity. It should be understood, rather, jurisdictionally, as a category of land subject to the jurisdiction of the Māori Land Court under TTWM 1993. Section 129(2)(b) of this Act defines Māori freehold land as land “the beneficial ownership of which has been determined by the Māori Land Court by freehold order”. The 1993 Act is the most recent in a long chain of Māori land statutes that began initially with the Native Lands Acts of 1862 and 1865. As noted already, a significant amount of the North Island is Māori freehold land, which is mainly concentrated in a few regions, such as the area around Lake Taupo, parts of the East Cape region, around Rotorua, the King Country, and in the far northern part of Northland. There are numerous problems with Māori land, including overcrowded titles and difficulties in obtaining access to development credit, but it is also important not to exaggerate this: many very

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“geothermal water” and “water body” as “fresh water or geothermal water in a river, lake, stream, pond, wetland, or aquifer”. The effect is that geothermal systems fall under ss 14 and 15 of the Resource Management Act, these being the main general provisions relating to water. As is the case with all water, no one may “take, use, dam, or divert” any geothermal water unless the use is allowed by a national environmental standard, a rule in a regional plan or by a resource consent: Resource Management Act 1991, s 14(3)(a).

<sup>12</sup> The Crown Minerals Act 1991, s 10 states: Notwithstanding anything to the contrary in any Act or in any Crown grant, certificate of title, lease, or other instrument of title, all petroleum, gold, silver, and uranium existing in its natural condition in land (whether or not the land has been alienated from the Crown) shall be the property of the Crown.

<sup>13</sup> See Richard Boast *Foreshore and Seabed* (LexisNexis, Wellington, 2005).

valuable farm properties and forests are located on well-managed parcels of Māori freehold land. Māori freehold land is meant to be registered under the Land Transfer Act (when registered it does not lose its status as Māori freehold land) but in fact the relationship between Māori freehold land and the Land Transfer Act is very confused in practice. This is certainly a major problem but we are unsure whether expounding upon this fits within the framework of a discussion on regulatory reform.

A key issue in New Zealand property law has long been the scope of the jurisdiction of the Māori Land Court. The Māori Land Court had as its principal original function the conversion of land held under customary title to a freehold Crown-granted title, which is what Māori freehold land essentially is: it is land that has always been in continuous Māori ownership but now held under Crown grant and as such registrable under the Land Transfer Act. Issues about whether the Court has jurisdiction over areas such as lakebeds, river beds and the foreshore have long troubled the legal system. If the Court does have such jurisdiction then – and this is the pivotal point – property rights held under Native title become liable to conversion into freehold grants. That was precisely the issue with respect to the foreshore and seabed.<sup>14</sup>

*Large areas in direct Crown title:* Another characteristic, as noted above, is that much of the New Zealand landmass (about half) belongs directly to the Crown. This means that the law relating to public lands, public reserves, and national parks is very important. Very little of this land is available for Crown grant, and it can be assumed that this area will stay in Crown title for the foreseeable future. In contrast to, for example, the western United States, there is little developed scholarship on the law relating to public lands; perhaps a strange situation in a jurisdiction where so much land is in direct Crown title.

*Continued importance of Māori property rights under the Treaty of Waitangi and common law Native title:* This too is an important feature of the current legal framework relating to lands and interests in land. The significance of this is of course highlighted by the continuing controversy over the foreshore and seabed. It can certainly be argued that the Foreshore and Seabed Act 2004 extinguished customary rights without compensation, which struck a jarring note at the time and which the present government has endeavoured to remedy with new legislation. The effects of rights protected either by Native title doctrine or by the Treaty of Waitangi on the actual law relating to land and interests in land, outside the special context of the foreshore and seabed, however, are not as significant as perhaps might be thought. The doctrine of indefeasibility of title means that in practice it is impossible to assert rights under the Treaty or under Native title to Land Transfer Act land, and in any event the Treaty of Waitangi remains

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<sup>14</sup>See Richard Boast *Foreshore and Seabed* (LexisNexis, Wellington, 2005).

unenforceable of itself in the ordinary courts.<sup>15</sup> This has long been the general position, and still remains so, notwithstanding some interesting dicta in the courts from time to time.<sup>16</sup> Rights and interests protected by the Treaty are enquired into by the Waitangi Tribunal acting under its special statutory jurisdiction under the Treaty of Waitangi Act 1975, but its core powers are recommendatory only. Claims are negotiated by the Crown and iwi leaders outside any formal statutory framework, resulting in a deed of settlement and then a claims settlement Act. These enactments can relate to national issues, such as the fisheries settlement acts of 1989 and 1992, or, more typically, to particular iwi, such as the enactments settling the historic grievances of Waikato-Tainui, Ngai Tahu or North Island groups with interests in the central North Island forests. These settlement acts do not impact on land owned privately, and it is also government policy not to use Crown land held as part of the conservation estate as a means of redress.

The picture that emerges is thus a complex one. In some respects the law is clear and straightforward (for instance with respect to general land) and there seems to be nothing much to “reform”, whether by way of regulation or otherwise. There are some particular issues, for instance the scope of Crown title over navigable rivers or the limits of non-compensable environmental regulation, but it is hard to see that there is any need for a major overhaul of our real property laws. The law does reflect to some degree the rise and fall of particular ideologies – while New Zealand’s socialistic or at least “big government” phase has come and gone, at least so it would seem, legal developments characteristic of this phase, including the nationalisation of resources such as geothermal energy and water development rights remain in the law, and sit alongside the strict protection of private property rights in the Land Transfer Act 1952 and the common law. The legal framework is a historical product, a product of a century and a half of changing ideas and growth and development (and regression and reaction as well). Such is the reality of what surrounds us today.

### 5.1.2 *Bundles of property rights*

The focus on title to property, and compensation for takings of that title, that we have used at [5.1.1] may now be extended by consideration of the different use rights that are associated with legal possession of title to property. In what follows we will define “property rights” as “the socially acceptable uses to which the holder of such rights can put the scarce

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<sup>15</sup> See Richard Boast “The Implications of Indefeasibility for Māori Land” in David Paul Grinlinton (ed) *Torrens in the Twenty-first Century* (Lexis Nexis, Wellington, 2003) at 101–118.

<sup>16</sup> *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 655–656 (per Cooke P).

resources to which these rights refer”.<sup>17</sup> A property right provides the right to use resources for certain purposes, and the holder of a property right is the person or group with the ability to exercise the relevant rights.

Most theories of the origins of property rights rest on the argument that these rights are shaped by the norms of society that facilitate low-cost coordination where there is scarcity, potential conflict, and external effects of actions. They recognise that property rights are not static but evolve over time with changes in society, economy and technology, and are honed over time by judicial and legislative decisions. In particular, it is the independence of the courts in resolving disputes about the ownership of or compensation for taking of existing property rights, and for defining and allocating ownership of new property rights as they emerge from social or technical change, that is important for economic progress.

There is no simple match between allocations of property rights and the concept of ownership as it is used in popular language. It is usually suggested that the concept of ownership is associated with a bundle of property rights, including: to occupy and to use the property, to enjoy the income generated from the legally permitted uses of the property, to exclude others from using the property, and to transfer control of some or all of the property rights to other owners on agreed terms.

The following individual rights are legally separable from possession of title to land, but none the less constitute individual rights that are central to efficient use of property in our society:

- a. The choice among all legal uses of the asset and the freedom from arbitrary changes to the constraints on these uses of the asset;
- b. The choice among all legal means of generating income from an asset, and the ability to retain all residual income generated by those uses;
- c. The freedom to exclude some or all third parties, and some or all the uses that they might make of the asset;
- d. The freedom to sell the asset to the highest bidder, or to otherwise enter into contracts to transfer and create legally-permitted rights over the asset.

The key aspect of these rights is that they may be impaired by a wide range of public regulation which places restrictions upon the use and enjoyment of privately held land. Consideration of the case for the protection of these rights therefore requires legal protections that are much wider than those associated with the protection of title to property.

New Zealand has no legal or constitutional protections against the impairment of a vast range of property rights, so long as the regulatory actions

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For an overview of the economic literature on property rights, see Harold Demsetz “Property Rights” in Peter Newman (ed) *The New Palgrave Dictionary of Economics and the Law* (Macmillan, London, 1998) vol 3 at 144–155.

that impair those rights fall short of requiring a public entity to take title to the property. In the last decade the trend has become even more pronounced as politicians have used claims of national interest in economic and environmental policy to justify a range of confiscatory measures that appeal to populist agendas, powerful lobby groups, or the personal interests of the politicians themselves. The most commonly cited examples, which suggest a need to reconsider our current level of protection of property rights, include the historical examples of nationalisation of mineral and water resources discussed at [5.1.1] and the following:

- a. The ability of local authorities under the Resource Management Act to introduce district plans which may change the designation of land. In particular, the introduction of protected areas, including landscape protection areas and areas in which development for residential or industrial uses is prohibited on environmental or aesthetic grounds, will often have the effect of confiscating development options associated with individual properties under the district plans in place when those properties were purchased. The fall in value resulting from the imposition of these protected areas can be substantial.<sup>18</sup>
- b. The designation of Auckland International Airport as an asset of strategic national importance by the government of Helen Clark in 2008, precluding the proposed sale of a 40 per cent stake in the airport to the Canada Pension Plan Investment Board. In this case the confiscation was of the right to sell to interests outside New Zealand – a portion of the right to alienate the property. The private loss from the confiscation of this property right may be gauged by the loss in the market value of the company as a result of the announcement – the best estimates of which are in the order of \$300 million. However, the cost to the economy overall as a result of increased uncertainty, deterrence of foreign investment, and the likelihood of owners of assets selling to foreign investors before their assets become large enough to be viewed by the government as strategic, are likely to be much higher.<sup>19</sup>
- c. The lack of clarity about the status of rights that fall short of title to property, but are nonetheless recognisable under the Treaty of Waitangi. Customary rights appear to fall into this category. The question, then, is whether confiscation of customary rights would attract compensation, and if so, what the legal and economic basis for compensation would be. The recognition provided by the Court of Appeal in *Ngati Apa*<sup>20</sup> that Māori customary title had not been extinguished by any general enactment and could therefore be asserted, the passage of the

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<sup>18</sup> An illustrative case occurred in 1997 when the then Banks Peninsula District Council (later to be amalgamated with the Christchurch City Council) introduced its Proposed District Plan. See *Briggs v Christchurch City Council* [2008] NZ Env C 113.

<sup>19</sup> Lewis Evans and Neil Quigley “Compensation for Takings of Private Property Rights and the Rule of Law” in Richard Ekins (ed) *Modern Challenges to the Rule of Law* (LexisNexis, Wellington, 2011) at 233.

<sup>20</sup> *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA).

Foreshore and Seabed Act 2004 (FSA) and the effect of this Act in extinguishing native customary title to the foreshore without compensation, have brought this issue into the public consciousness in recent years. However, the resolution proposed by the current government is pragmatic in addressing the political problems raised by the FSA rather than fundamental in the sense of addressing the broader question of compensable takings.

The courts in the United States and Canada have adopted a narrow interpretation of rights to protection from confiscation of property such as that in place in New Zealand,<sup>21</sup> and they have been prepared to consider compensation for regulatory action only where the resulting losses are equivalent to those that would have resulted from acquisition of title.<sup>22</sup> We consider this approach to be difficult to support for two reasons:

- a. In each case of regulatory takings there is both an action by a public body, and loss imposed on a private interest. There can therefore be no doubt about the source of the loss, and it seems likely that such losses would be compensable if they arose as a result of the interaction of two private parties.
- b. Economically, there is no difference between the loss imposed by the regulatory restrictions and loss imposed by the taking of title. Indeed, regulatory losses may be far larger in economic terms than losses associated with confiscation. If the government takes 10 per cent of my farm to build a road, they pay me compensation at fair market value. But if the government reduces the value of my farm by 50 per cent by designating it a landscape protection area in which residential development is precluded, the economic loss is larger but no compensation is payable.

But in a range of other developed countries, workable alternatives have been adopted which provide compensation for losses in the value of property resulting from land use planning or other public regulation which constrains use rights rather than property value. Those countries include Sweden, Israel, the Netherlands, Finland and Austria.<sup>23</sup>

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<sup>21</sup> See Russell Brown "Possibilities and Pitfalls of Comparative Analysis of Property Rights Protections, and the Canadian Regime of Legal Protection Against Takings" in this volume (ch 6); Richard Epstein *Takings: Private Property and the Power of Eminent Domain* (Harvard University Press, Cambridge (Mass), 1985).

<sup>22</sup> See *Pennsylvania Coal Co v Mahon* 260 US 393 (1922); and the clarification that compensation required a taking of rights equivalent to a taking of title in *Lucas v South Carolina Coastal Council* 505 US 1003 (1992). For a case in Canada where compensation was not required despite a high level of impairment of use rights see *Canadian Pacific Railway Co v Vancouver (City)* 2006 SCC 5, [2006] 1 SCR 227.

<sup>23</sup> Rachele Alterman *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights* (American Bar Association, Chicago, 2010).

The current property rights regime in New Zealand is supported by four principal concerns about the introduction of stronger protection and requirements for compensation associated with a move to regimes such as those identified in the previous paragraph.

The first concern is that the introduction of wider protections of property rights would at best create a substantial increase in the burden on the court system, and at worst turn New Zealand into the nightmare of continuous litigation that is widely presumed to characterise business activity in the United States. This claim seems to us to be inappropriate for two reasons. The first is that under present regulatory structures litigation driven by regulation of property rights is already very considerable. As mentioned, the RMA exemplar invites property rights claims by special interest groups, and debates about these carry very high transactions costs. It is not at all clear that the litigation and transactions cost would rise if property rights were recognised more explicitly. The second reason is because the United States law on takings is primarily common law, based on judicial interpretation of a powerful but none-the-less skeletal reference in the Fifth Amendment to the United States Constitution: “Nor shall private property be taken for public use without just compensation”. With this phrase the courts in the United States were set the task not only of identifying appropriate standards, but of defining the range of private property rights protected by the Constitution. And while the United States courts have been relatively conservative in defining the range of takings of rights for which they will require compensation to be paid, they have at least been prepared to hear arguments on a very wide range of interpretations on the meaning of “private property” within the context of that amendment to the Constitution. It seems therefore that if New Zealand moved to strengthen protection of property rights we should not be so naïve as to ignore the lessons provided by the development of United States common law in this sphere, or that our legislators would not take the opportunity to provide the courts with considerably more detailed direction on what Parliament intended. Nevertheless, the principle in the Regulatory Standards Bill set out above, while providing more detail than the United States Fifth Amendment, still remains rather skeletal. More detail may be helpful, although what that detail should be is something that this project will explore. That is not to deny that there would be an important role for the courts, as the boundaries of what was intended were defined and as new rights created by the development of the economy and our society were developed.

A second concern, also relating to the constitutional direction on property rights in the United States, is that New Zealand does not have a constitution and its courts do not have the same constitutional role that they enjoy in the United States. Certainly this precludes entrenching a particular level of, and approach to, protection of property rights, but it does have the benefit of making it easier to provide much greater direction to the courts on the intentions of the legislators. Moreover, by comparison with the current state of affairs in New Zealand, any legislation would be a step forward. Legislation

would create a legally enforceable requirement, on the part of any future government, to explicitly defend takings of property rights in court and to pay just compensation for any diminution of the value of property caused by government action.

A third concern, widely cited in the international literature, is that the range of complexity of potential property right cases is so wide that the courts could not determine workable standards which would create a coherent body of precedent that went beyond the current definition of compensation for takings of ownership.<sup>24</sup> To an outside observer, however, it is difficult to see how the complexity of property right issues could be greater than it is in other areas involving rights, such as freedom of speech. In addition, some obvious standards already exist: zoning regulations and specific taxes which prohibit actions that are a nuisance (pig or poultry farming in urban areas) or impose specific taxes on substances that are damaging to health (alcohol and tobacco) present cases in which a failure to pay compensation could be justified.

Finally, and in our view most importantly, it is suggested that a wider protection of property rights would unreasonably constrain a modern government in the exercise of actions that were in the public interest. That there would be constraints on government actions that imposed private costs in pursuit of the public interest is correct: indeed it is the heart of the matter. There is a broadly shared sentiment that the regulation of property rights is a legitimate planning tool that ought not, in the public interest, be confined by hard and fast constitutional rules that might have the effect of tying the government's hands in advancing its policies, particularly as they pertain to public welfare or environmental protection. The constraint on government resulting from wider protection of property rights, however, would not be a constraint on action but a constraint on the way in which the costs and benefits were evaluated. In other words, the constraint would in fact be the requirement to weigh the claimed public benefits of the action against the private costs from the takings of rights required, and to fund from levies on taxpayers. Where the burden of the regulation applies narrowly (to a small number of people) by comparison with a much larger group of beneficiaries, then there is a strong case to be made on the grounds of economic efficiency for compensation of private losses. Put in the most general possible way, broader protection of property rights would be most helpful in curbing the enthusiasm that politicians currently display for the loose use of the term "public interest".

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Richard Epstein *Takings: Private Property and the Power of Eminent Domain* (Harvard University Press, Cambridge (Mass), 1985). Rachele Alterman *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights* (American Bar Association, Chicago, 2010).

## **5.2 Conclusion: the issues to be addressed**

New Zealand has settled into a distinctive pattern when it comes to property rights in land, in which the state has played a very large role by setting up state-guaranteed systems of title and by the nationalisation of key mineral and energy resource now administered by a various kinds of licensing systems principally controlled by the Resource Management and Crown Minerals Acts. There seems little support for these basic structures to be disturbed. Two key issues therefore remain for further analysis, these being:

- a. Whether some kind of formal constitutionalisation of property rights nevertheless should be considered (which might arguably provide a framework by which legislation such as the Foreshore and Seabed Act 2004 might have been avoided, or at least modified); and
- b. Whether some effort should be made to attempt to define the limits of land use control under the guise of environmental regulation or more general national interest considerations.

A focus on the protection of title to property has allowed the courts to retreat to the comfortable position of providing compensation where title is confiscated, or where regulatory takings are so extreme as to cause loss equivalent to takings of title to property. The problem with this approach is three-fold.

- a. It leaves open to the state, and many state agencies delegated the authority to regulate real, corporate and intellectual property, the ability to introduce regulations which confiscate a very large part of the value of privately held assets without any requirement to provide compensation.
- b. It leaves open to the state the ability to nationalise those resources in which private rights of ownership would have been recognised under the common law, but for which the private owners held no formal title. The historical examples (water, petroleum) provided in 5.1.1 are of continuing relevance because new economically valuable resources not explicitly covered by formal title will be covered in the future.
- c. It fails to provide an intellectually satisfactory framework within which contemporary recognition and enforcement of various rights recognisable under the Treaty of Waitangi, can be integrated into our approach to the protection of property. The political power of Māori in contemporary New Zealand society may allow them to achieve some compensation when (for example) customary rights are taken, but this is a highly unsatisfactory basis on which to run a legal system or a country.

To get a better outcome we would need to provide in constitutional or legislative form for:

- a. The protection of property rights, not title to property. This would provide a means of recognising and protecting both rights that fall short

of ownership and rights that are not explicitly related to ownership (such as customary rights).

- b. A focus on compensation for economic loss resulting from the impairment of rights, rather than a focus solely on compensation for takings of title to property.

Consideration of such an approach raises many questions of detail that we have not attempted to address here. But we do not see those questions of detail as a credible barrier to further investigation of the protection of property rights outlined in this chapter. In a number of developed countries, requirements for compensation for losses imposed by government regulatory action are in place and appear workable. In addition, New Zealand has no choice but to grapple with the legal and economic questions raised by the existence of the Treaty of Waitangi. The challenge, therefore, is to create a legal framework – whether constitutional or otherwise – which is capable of addressing rights of compensation for loss of the value of rights in property arising from regulation or other state actions as this is relevant to contemporary New Zealand.