Legal Aspects of High Country Pastoral Leases and the Tenure Review Process: A Background Paper

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Disclaimer
The opinions expressed in this paper are those of the author and do not necessarily represent the views of the Parliamentary Commissioner for the Environment. Barry Barton is a Professor of Law at the University of Waikato. He has produced this background paper in his private capacity.

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1. Introduction

This is a background paper summarizing key legal aspects of high country pastoral leases and the tenure review process. It was prepared to assist the Parliamentary Commissioner for the Environment with its work, but the brief was a general one. The paper is confined to legal issues and does not include an examination of practices or decisions in relation to leases or tenure review. It does not provide a legal opinion on any particular occurrence. It leaves a number of issues explored but not fully investigated. There has been no perusal of leases, permits, or other instruments. The paper comments on matters where it may be desirable to consider and discuss the legal basis of management of pastoral leases and tenure review, and the conformity of that management with the legislation. It also comments on strengths and weaknesses of the legislation.

2. The Land Acts

A. The Two Acts

Land has been central for much of New Zealand's history. For Maori, after the Treaty of Waitangi, the great question was to what extent would they hold on to their lands and to what extent they would sell them to the Crown. Land came to be Crown land after it was bought, confiscated or otherwise obtained from Maori. In the South Island high country, most land was bought from Maori in the first 25 years of the colony. For settlers, land was an enormous attraction to migrate to the new colony. The terms on which Crown land was available were a matter of great importance, so during the nineteenth and early twentieth century there were numerous revisions and amendments of the Land Act. It was the same in other settler colonies such as the United States, Canada, and Australia. The Land Act 1948 is the present form of this legislation. It brought forward content from former Land Acts, and it introduced innovations such as the perpetual renewal of the pastoral lease.

The Land Act 1948 defines what land is Crown land and therefore subject to its provisions. It provides a means of classifying Crown land available for disposal, as described below, and it provides for its disposition in different ways.

The Crown Pastoral Land Act 1998, as its name suggests, deals with pastoral land and its disposition. Part 1 enacts new rules for the administration of existing pastoral leases and occupation licences. In particular, it closes off pastoral land as a class into which Crown land can be classified, and it closes off further dispositions, or grants, of pastoral leases and pastoral occupation licences. Part 2 establishes a new system for tenure review of pastoral leases. Part 3 extends the tenure review system to land held under an unrenewable occupation licence and to unused Crown land. It is sometimes necessary to explain the law laid down in the Land Act 1948 before the Crown Pastoral Land Act was passed, in order to explain the changes made when the latter Act came into force, on 23 June 1998.

Section 23, the last section of Part 1 of the 1998 Act, concerns its relationship with the 1948 Act:

> Except as provided in sections 4 to 22, nothing in this Part limits or affects the continued application of the Land Act 1948 to any reviewable instrument or any land.

Thus the two Acts need to be read side by side. In effect, the 1998 Act could have been passed as an amendment of the 1948 Act, changing a number of provisions, and introducing a new part. It is likely that they must be read together (*in pari materia*). For instance, one notices that 'Commissioner' is not defined in the 1998 Act, but there is little doubt which official is intended.

B. The Commissioner

Under section 24AA of the 1948 Act, the Commissioner of Crown Lands is appointed to manage Crown lands, and reports directly to the Minister. (The Minister is the Minister of Lands: section 2.) Formerly there was a Land Settlement Board and a Director-General, but their roles are now performed by the Commissioner: sections 2 & 24AA. And formerly there was a Commissioner for every Land District, but now there is only one. Under section 24AB the Commissioner has delegated statutory powers to Land Information New Zealand (LINZ). More is to be said on the role of the Commissioner below.

The Commissioner has a wide range of specific powers under different sections of the Acts. He or she has general powers and duties in respect of Crown land under section 24 of the 1948 Act: to prevent trespass, to remove trespassers, to define boundaries, to take possession, to sue for and recover money due to the Crown, to enforce contracts, to determine determinable contracts, to resume possession on non-performance of contracts, and to recover money due in respect of any sales, leases, licences, or other dispositions. The Commissioner may commence legal action on behalf of Her Majesty, and may execute documents on behalf of Her Majesty. Under sections 25 and 26 the Commissioner may recover possession of Crown land and enter and inspect Crown land under lease or licence. The Commissioner may delegate his or her powers under section 24(2).

These and other sections indicate that the Commissioner has a general obligation to safeguard the interests of the Crown in Crown land.

C. Classification

Until 1998, all Crown land that was available for disposal could be classified by the Commissioner (formerly the Board) under section 51 of the Land Act. Land could be classified and reclassified as:

> (a) Farm land, being land suitable or adaptable for any type of farming:
> (b) Urban land, being land suitable or adaptable for residential purposes, and being in or in the vicinity of any urban area of a district of a territorial authority or proposed urban area of such a district:
> (c) Commercial or industrial land, being land suitable or adaptable for use for any commercial or industrial purpose:
> (d) Pastoral land, being land that is suitable or adaptable primarily for pastoral purposes only.

The 1998 Act removed the option of classifying Crown land into pastoral land, by repealing section 51(1)(d) above. (See section 104 of the 1998 Act.) The general power of the Commissioner (Board) to reclassify land was restricted to prevent the Commissioner

from reclassifying pastoral land. Combined with the removal of the power to classify into pastoral land in subsection (1)(d), this means that from 1998 the classification of pastoral land under the Land Act has been frozen; land can neither be added to that class, nor removed from it unless expressly permitted by a provision such as section 65 as the result of a tenure review. Subsection 51(3) now reads, ie after 1998: 'The Commissioner may classify again under subsection (1) any land (other than pastoral land) that has at any time been classified under that subsection or a corresponding provision of a former Land Act, whether or not the land is at the time let on any lease or licence.'

Where pastoral land was reclassified as farm land before 1998, section 126A of the Land Act allowed the holder of a pastoral lease of the land to surrender the lease and obtain in exchange an ordinary renewable lease, which was not necessarily restricted to pastoral farming. But section 126A was repealed in 1998.

The 1948 Act defines 'pastoral land' as 'Crown land that is for the time being so classified by the Board under section 51 of this Act'. This definition is still in place. The 1998 Act definition is the same, except that the words 'by the Board' are replaced by 'under section 51 of the Land Act 1948' and the words 'that is' have been deleted.

D. Disposal

Land in the first three classes can be disposed of by renewable lease (section 63), purchase for cash (section 64), or deferred payment licence (section 65). These options are still in the 1948 Act.

Before 1998, land in the fourth class, pastoral land, could be disposed of by pastoral lease (section 66) or pastoral occupation licence (section 66AA). But since 1998, pastoral land can no longer be disposed of by pastoral lease or licence, as is discussed more fully below. Section 62 of the 1948 Act gave the general framework for this. (Note that section 62(b) was repealed in 1998.)

E. Special Dispositions

While these are the main forms of disposal (or alienation, or allocation) of Crown land, other means of disposal are provided by the Land Act 1948 for various special circumstances. For example Crown land purchased, acquired, set apart, or held by the Crown for any Government purpose and not for the time being required for that purpose can be leased under section 48. There are several different provisions for disposal under section 67. Under section 67(2), Crown land available for disposal but which in the opinion of the Commissioner ought not for any reason be permanently alienated may be leased. Under section 67(3), the Commissioner may classify as a 'special leasing area' land available for disposal that is in the vicinity of a National Park, and that land may be subdivided for residential or commercial purposes and disposed of by way of lease. (This subsection was revised in 1989 with only minor changes, and continues after 1998, although with modifications in section 67A.) Under section 67(4), the Commissioner may lease Crown land that in his or her opinion ought not be permanently alienated until a period of time has elapsed or certain conditions have been fulfilled. (Section 67(1) has not applied to pastoral land since 1998.) Under section 68, the Commissioner may grant short-

term licences (up to five years) for grazing 'or other purposes'. Section 68A provides for grazing permits and section 69 for communal run-off grazing. Recreation permits, discussed further below, can be granted under section 66A to authorize the use of land for commercial undertakings.

3. Pastoral Leases

A. General

Pastoral leases and pastoral occupation licences no longer available. Section 66(1)-(3) of the 1948 Act read:

> (1) The Board may from time to time, in accordance with this section, grant leases of pastoral land.
> (2) A pastoral lease shall entitle the holder to the exclusive right of pasturage over the land comprised in the lease, and a perpetual right of renewal for terms of 33 years, but shall give him no right to the soil, and no right to acquire the fee simple.
> (3) A pastoral lease may be granted subject to such restrictions as to the numbers of stock to be carried on the land comprised in the lease as the Board determines.

This allowed the grant of pastoral leases and defined their nature. The 1998 Act repealed section 66 and put in its place sections 4 and 9 of the 1998 Act, which are substantially replacements of subsection (2) above, on the nature of a pastoral lease, and of subsection (3), which concerns stock limitations (described below). But there is no equivalent of subsection 66(1) in the 1998 Act. The result is that from 1998 the Commissioner can no longer grant pastoral leases, but the leases in existence at that time continue in force. The only exception that allows new pastoral leases to be granted is section 93(4) of the 1948 Act, on the occasion of subdivision of an existing pastoral lease.

The same was done with pastoral occupation licences. They were granted under section 66AA(1) of the 1948 Act. The 1998 Act repealed section 66AA and put in its place section 12 of the 1998 Act, which is substantially a replacement of subsection (2), on the nature of a licence. But there is no equivalent of subsection 66AA(1) in the 1998 Act. The result is that from 1998 the Commissioner can no longer grant pastoral occupation licences, but the licences in existence at that time carry on with much the same nature. The only exception is section 14 of the 1998 Act, which allows the grant of a further five-year occupation licence to the holder of an existing licence granted under the 1948 Act. The 1998 Act defines 'occupation licence' as 'licence granted under section 66AA of the Land Act 1948 or section 14(7) of this Act'.

Reviewable instrument. 'Reviewable instrument' in the 1998 Act is a class that includes a lease under section 66(1) of the 1948 Act (a pastoral lease) or section 67 (various special leases of non-pastoral land), and it includes an 'occupation licence' being what the 1948 Act described as a pastoral occupation licence, under section 66AA, or being a licence issued under the 1998 Act's section 14(7) to an existing licence holder.

Rights granted by pastoral lease and pastoral occupation licence. The pastoral lease and the occupation licence, the two types of disposition of pastoral land, both grant the exclusive right of pasturage over the land: sections 4 and 12 of the 1998 Act, essentially

replacing sections 66 and 66AA of the 1948 Act. Sections 4 and 12 go on to say that neither gives any right to the soil (to use the words of the statute), and neither gives a right to acquire the fee simple. The difference between the two is that a pastoral lease gives a perpetual right of renewal for terms of 33 years, while a pastoral occupation licence is for a maximum of 21 years and is not renewable except in accordance with section 14 for a further period not exceeding 5 years.

Pastoral leases are different from renewable leases under section 63 of the 1948 Act that do grant a right to acquire the fee simple. Section 4 of the 1998 Act seems clear on this. But an additional right to acquire the fee simple is conferred on a lessee under 'a lease in perpetuity' (not defined) by section 124A of the 1948 Act, which was inserted in 1982. It seems likely that section 4 of the 1998 Act prevails over this provision, but the matter has not been investigated.

Both the Land Act 1948 and the 1998 Act have various provisions for the rights and duties of the parties under a pastoral lease or pastoral occupation licence. Many of those in the former Act have been replaced by provisions in the latter. Further provisions are stipulated by the Land Act Regulations 1949, in relation to notices, forms, and (in Regulations 7 and 8) the right of the Commissioner to build water races and lay water pipes, and the duty of the lessee or licensee not to interfere with any creek or watercourse on the land without consent.

Rent and rent reviews. Rent payable under a pastoral lease is calculated in a manner prescribed by statute, originally subsections 66(5) to (8) of the 1948 Act and now sections 6 to 8 of the 1998 Act. Rent is reviewed every 11 years. Disputed rentals are decided by the Land Valuation Tribunal.

Commissioner of Crown Lands v Emmerson, District Court, Dunedin, LVP417/95, 22 Aug 1996, Everitt DCJ, held that even where proceedings to fix the rental on renewal of a pastoral lease involved a substantial legal issue (whether the value of land exclusive of improvements includes the regeneration of the land such as by the removal of rabbits) it should be heard in the first instance by the Land Valuation Tribunal and not transferred to the High Court. Parliament provided for specialist Tribunals to apply their expertise, and the amount of this claim was not significant in terms of the Tribunal's experience, nor were the issues particularly complex. Later proceedings in the case are said to hold that rabbit removal and weed control could constitute improvements. (Brower p 55 refers to the later decision but it has not been found for this paper.)

Transfer and registration. Pastoral leases and occupation licences are transferable with the consent of the Commissioner, which consent may be subject to conditions: section 89 of the 1948 Act. (Sections 90-95 also relate.) In recent Court of Appeal proceedings it was agreed that the acceptance by a pastoral lessee of the Land Settlement Board's conditions for approving a transfer of a lease had contractual effect between the lessee and the Commissioner: *Hunter Valley Station Ltd v Attorney-General*, Court of Appeal, CA 38-05, William Young P, Robertson & Allan JJ, 26 May 2006. (The Court's recording of the lessee's acceptance of this point does not quite amount to a decision on it after argument.)

Pastoral leases and pastoral occupation licences are registered by the District Land Registrar, but in a separate register from those under the Land Transfer Act 1952: sections 82(4) and 83.

Resumption and designation of reserves. Section 117 of the 1948 Act gives the Governor-General a right of resumption of land under lease or licence if it is required for any road, street, or public purpose, or for mining and related purposes. The lessee is entitled to compensation for loss of his or her interest or for injurious affection.

Section 167 of the 1948 Act empowers the Minister of Conservation, with the prior consent in writing of the Minister of Lands, to set apart as a reserve any Crown land for any purpose which in his or her opinion is desirable in the public interest. Land may be so set apart 'notwithstanding that it is subject to a pastoral lease or a pastoral occupation licence'(subsection (3)). Any land so set apart as a reserve for any public purpose which is a "Government work" is subject to the Public Works Act 1981, so that compensation may be payable in these circumstances (subsection (4) and as provided by the Public Works Act 1981). However the implications of these provisions have not been investigated. (There are difficulties with them, especially in the reference to section 35 of the Public Works Act.)

B. Sources of Rights and Obligations

There is little benefit to be had in a full account of the rights and obligations of the parties to a pastoral lease, beyond the outline above, without a specific focus. Rather, it seems useful to identify the sources from which rights and obligations may come. These are:

1 Land Act and Regulations
2 Crown Pastoral Land Act
3 Covenants and Powers Expressly Provided in the Lease or Licence
4 Covenants and Powers Implied by the Law.

(In passing, it should be noted that LINZ standards or standard procedures cannot be a source of legal rights and obligations, even though they may be useful administrative guidance for the landlord and tenant alike.)

Covenants and powers consistent with statute. As to item 3, it seems reasonably clear that the Commissioner can issue a lease or licence subject to further express covenants and conditions than are mentioned in the legislation; indeed section 103 of the Land Act 1948 says so explicitly. However that section says that such covenants and conditions must not be inconsistent with the legislation: 'Every lease or licence … may contain further express covenants and conditions…, not inconsistent with this Act …'. Likewise, section 81(1) grants general authority to the Commissioner in respect of instruments: 'The Board may issue leases and licences and other instruments over or in respect of Crown land.' But this does not oust specific provisions for dispositions. This is immediately apparent from the next subsection:

> (2) Every lease or licence and any renewal thereof issued by the Board shall be in such form and subject to such covenants and conditions, not inconsistent with this Act, as the Board determines. Any lease or licence may be varied to suit the circumstances of any particular case which may arise.

It is clear that Part 5 of the 1948 Act, which begins with section 81, is general, in dealing with mode of execution, registration, and such matters; whereas sections 66 and 66AA, now sections 4 and 12 of the 1998 Act, are specific about the kinds of leases and licences that are available, what land they may be used for, and what purposes they may be put to. The same goes for registration of variations under sections 113 and 170A. So requirements imposed in the Act (such as only pastoral use of land) cannot be contradicted or circumvented by the terms of the lease or licence.

General law. As to item 4, neither common law nor equity will impose terms in contradiction of the express terms of the legislation or of the express terms of the lease or licence. They will however imply necessary covenants such as a covenant of quiet enjoyment, which ensures the tenant has the right to exclusive possession without disturbance. Equity will intervene in granting relief against forfeiture. [1] In addition, general statutes such as the Property Law Act 1952 imply terms in leases. How these apply to Land Act leases and licences has not been investigated in any depth.

In passing, it may be commented that at common law the right to exclusive possession is central to a lease. Section 4 of the 1998 Act arguably is equivocal about this, but a fair reading of the Acts as a whole would suggest that pastoral leases are intended to carry a right to exclusive possession of the land. (For example, section 117 speaks of resuming possession.) The right to exclusive possession may be defended by suing interlopers in trespass.

4. Use of Pastoral Leases for Non-Pastoral Purposes

Can the holder of a pastoral lease use the land comprised in the lease for non-pastoral purposes, such as tourism or viticulture?

A. Legislation

Section 4 of the 1998 Act may be quoted:

> 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.

It is, as noted above, essentially a replacement of section 66(2) of the 1948 Act. In either form, it plainly restricts the leaseholder to pasturage; other land uses are not permitted. The restriction is emphasized by the stock limitations that can be imposed under section 9 of the 1998 Act, previously under subsection 66(3) of the 1948 Act. Section 12 of the 1998 imposes the same restriction of 'the exclusive right of pasturage' on the holders of occupation licences.

[1] Since this report was written, the Property Law Act 2007 has replaced the Property Law Act 1952. It codifies relief against forfeiture and implies new terms in leases entered into on or after 1 January 2008.

This firm restriction of the use of pastoral leases and licences to pastoral purposes is reinforced by later provisions in Part 5. Section 99 obliges the lessee or licensee to farm the land diligently and in a husbandlike manner according to the rules of good husbandry. The burning of vegetation is controlled by section 15 of the 1998 Act, replacing section 106 of the 1948 Act. Section 16 of the 1998 Act, replacing section 108 of the 1948 Act, explicitly prohibits a number of non-pastoral activities:

> (1) Except as provided in subsection (2), a lessee or licensee of pastoral land must not–
> (a) Clear or fell any bush or scrub on the land:
> (b) Crop, cultivate, drain, or plough any part of the land:
> (c) Top-dress any part of the land:
> (d) Sow any part of the land with seed:
> (e) Plant any tree or trees on the land:
> (f) Form any path, road, or track on the land:
> (g) Undertake any other activity affecting, or involving or causing disturbance to, the soil.

The Commissioner may consent to such activities under section 16(2) of the 1998 Act. Before doing so, however, or giving consent under section 15 (or making decisions on stock limitations), the Commissioner must consult the Director-General of Conservation, and take into account the desirability of protecting inherent values of the land concerned (other than attributes and characteristics of a recreational value only) and in particular the inherent values of indigenous plants and animals and natural ecosystems and landscapes and the desirability of making it easier to use the land concerned for farming purposes: section 18. A consent to crop, cultivate, or plough is deemed subject to a condition (unless the Commissioner determines otherwise) that the lessee must at the end of the lease leave the land properly laid down in good permanent pasture (section 16(4)). As we have noted, it is not possible for the Commissioner to grant a lease on covenants that waive these requirements. Pastoral use prevails.

It is likely that the power of the Commissioner to consent to non-pastoral activities would be construed by a court as being fairly general, but by no means unlimited. A court would be sure to look at the strong clear intention of the legislature, expressed in the 1948 Act as a whole and not diluted by the 1998 Act, that pastoral land is to be used for pastoral purposes, with only limited exceptions. Any wholesale approval by the Commissioner of non-pastoral purposes would be an abuse of discretion beyond the law.

B. Meaning of Pastoral

Neither the 1948 Act nor the 1998 Act define ‘pastoral’ or ‘pasturage.’ However, the meaning of the word ‘pastoral’ and related words seems entirely unequivocal, and has been stable since the times of Middle English. The following definitions appear in the *Shorter Oxford Dictionary* (1993):

> Pastoral
>
> > a. & n. LME. … **A** *adj*. **I 1** Of or pertaining to shepherds or their occupation; pertaining to or occupied in sheep or cattle farming. LME. **b** (Of land) used for pasture; (of scenery, a landscape, etc.) having the simplicity or natural charm associated with pastureland. L18. **2** Of literature, music, or works of art: …

II 3 Of or pertaining to a pastor or the spiritual care of a congregation … *Special collocations*: … **pastoral lease** *Austral. & NZ* a lease of land for sheep or cattle farming. …

Pasturage

n. E16. … **1** The action or occupation of pasturing animals. E16. **2** = PASTURE *n*. **I**. E16. 3 Pasture-land; a piece of grazing land. E16. **4** *Sc. Law*. The servitude right of pasture. L16.

Pasture

n. ME. … **1** The grass or herbage eaten by grazing animals, esp cattle or sheep. ME. **2** A piece of land covered with grass used or suitable for the grazing of animals, esp. cattle or sheep; pasture-land. ME. **3** The action of an animal feeding. *rare*. ME. †**4** Food; nourishment, sustenance, *lit*. & *fig*. LME-L18

The example of the use of the term 'pastoral lease' in Australia and New Zealand is particularly conspicuous.

As for the *Concise Oxford Dictionary 10th ed* (2002):

pasturage ● **n. 1** land used for pasture. **2** the occupation or process of pasturing animals.

pasture ● **n. 1** land covered mainly with grass, suitable for grazing cattle or sheep. **2** grass and herbage growing on such land. ● **v.** put (animals) to graze in a pasture.

The term has been considered in court in *Attorney General v Feary*, High Court, Christchurch, CP89/97, Chisholm J, 12 Nov 1997. The defendants, the holders of a pastoral lease intended to cut a number of tracks, relying on the authority of an approved statutory soil and water conservation plan. The Court agreed with the Commissioner of Crown Lands that the plan did not give authority or consent. The Court started with section 66(2) of the Land Act, quoted above, and said at p 7,

> Reference to the right of *pasturage* over the land indicates that the primary right conferred by the lease is a right to depasture livestock on the land. This concept is emphasised by the indication that the rights conferred do not include a right to the soil. [Counsel for the defendants] argued that this reference to the soil was intended to spell out that a lessee could not use soil for commercial purposes, for example, by mining the soil for sale. In my view that restrictive interpretation is not supported by the wording of the section. If that had been the statutory intention the section would have specified that there was no right to *remove* soil. The statutory reference to soil is wider and is intended to emphasise the restricted characteristics of a pastoral lease.

Obligations under section 99 to farm the land diligently and in a husbandlike manner according to the rules of good husbandry also emphasised that the use of the land by the lessee was to be confined to the grazing of livestock. Section 104, requiring the lessee to effect improvements that the Board specified, empowered the Board to specify the improvements required on particular properties. These factors led to the conclusion that construction of tracks involving disturbance of soil on lands held under a pastoral lease requires Crown consent. The Crown therefore had an arguable case that supported the continuation of an interim injunction.

There is therefore very little room for doubt about the meaning and extent of the term 'pastoral' in the restriction of permissible uses under a pastoral lease.

C. Recreation Permits

The Commissioner may issue a recreation permit to authorize the use of land for non-pastoral purposes. The Commissioner may call for public applications or may act without requiring competition. Section 66A was inserted in the Land Act in 1975, and was not amended by the 1998 Act. A recreation permit may be issued for any land comprised in a pastoral lease or pastoral occupation licence, either to the holder of the lease or licence, or to another person with the consent of the holder. (In such a case section 18 of the 1998 Act applies, as discussed below, requiring consultation of the Director-General of Conservation.) Or a permit may be issued for Crown land that is not the subject of any lease or licence, in which case the Commissioner may require the applicant to give public notice, and may grant or refuse to grant a permit to the applicant: subsection (2A). A recreation permit appears to be a hybrid with characteristics both of a disposition of an interest in land and of an administrative approval.

The purposes for which a recreation permit may be issued are stated in subsection 66A(1) as being

> for any commercial undertaking involving the use of land for any recreational, tourist, accommodation, safari, or other purpose that, in the opinion of the [Commissioner], may be properly undertaken on that land.

Several points can be made about this set of purposes. The purpose must be a commercial undertaking. While this may be thought to narrow the purposes, it has an effect of widening the consideration to the commercial character of land use. The list of 'recreational, tourist, accommodation, safari' indicates a class or genus that may be considered to be the hospitality and tourism sector. The words 'or other purpose' must probably be interpreted in the light of that class or genus; that is, their context indicates that the legislature means them to encompass related purposes, and does not mean them literally to encompass any other purpose whatsoever. (See J F Burrows, *Statute Law in New Zealand, 3d ed* (Wellington: Lexisnexis, 2003) pp 142, 157.) The Act provides no threshold that would exclude small commercial hospitality operations like homestays, farm tours, heliskiing, or guided hunting. All commercial operations, no matter what size, require a recreation permit.

It is probable that some commercial tourist and recreational purposes are not contemplated by section 66A and therefore not available on Crown land under a recreation permit. Although it is not easy to say precisely where the boundary lies, it would seem strange if Parliament had intended that the provisions for recreation permits be available to authorize major developments such as hotels or resorts. There is the question of the suitability of this one section to grant tenure for major developments, and there is the question of the clear legislative intention that pastoral land be used, with few exceptions, for pastoral purposes.

Subsection (7) declares that a holder of a pastoral lease or licence cannot use or permit to be used his or her land to be used for any purpose for which a recreation permit may be issued unless he is a holder of a recreation permit that authorises the use of the land for that purpose. To do so is a breach of the lease or licence, and renders the lease or licence liable to forfeiture. This is a vigorous prohibition, especially when it is for any purpose for

which a permit may be issued. It reinforces the necessary implication that if ordinarily something requires a recreation permit then it cannot be done under implication under a pastoral lease.

A recreation permit cannot be issued where it would be incompatible with water or soil conservation objectives: subsection (3). If one is issued, it may require the leaseholder to surrender land in order to facilitate measures to prevent erosion: subsection (4).

Before issuing a recreation permit for pastoral land, the Commissioner must consult the Director-General of Conservation, and must consult him or her about any other discretionary action under section 66A of the 1948 Act: section 18 of the 1998 Act. In addition, the Commissioner must under section 18(2) take into account:

> (a) The desirability of protecting the inherent values of the land concerned (other than attributes and characteristics of a recreational value only), and in particular the inherent values of indigenous plants and animals, and natural ecosystems and landscapes; and
> (b) The desirability of making it easier to use the land concerned for farming purposes.

The identification by the Act of these matters to be taken into account raises issues of the same kind as those identified in sections 24 and 25 for tenure reviews, discussed below. One notices differences between this section and those; section 18(2) speaks of the desirability of protecting inherent values without them having to be significant; but recreational values are excluded, and the matters to be taken into account are couched in no stronger terms than *desirability* of protecting inherent values and *making it easier* to use the land for farming purposes.

A recreation permit is issued subject to terms and conditions, and may require payment of fees: section 66A(6) of the 1948 Act. However the Act says nothing about the permissible term, the fees, or the conditions. It is a condition that the holder of the permit will comply with local authority requirements and with the Resource Management Act: section 66A(5).

The power to grant recreation permits is a very significant one. Many of the uses of high country land that have the highest financial yields at the present day probably require a recreation permit. Given this significance, it is striking that the legislation embodies few substantive and procedural safeguards in comparison with more modern legislation. The process for acquisition of a permit is only slightly competitive where the land is outside any pastoral lease, and not at all if it is in one. There are no rules for the duration of a permit, for the protection of public access, or for disclosure and review of the financial returns to the public. Consultation with the Department of Conservation will not address those matters. On conservation matters, that consultation is only a modest procedural safeguard, and the matters to be taken into account under section 18(2) of the 1998 are not forcefully expressed. The consultation and the section 18(2) consideration are not required if the land is classified other than as pastoral. From a policy point of view, there is a clear case for examination of section 66A of the 1948 Act with a view to reform.

D. Discussion

The conclusion from the words of the statute and from *Attorney General v Feary* is that the holder of a Land Act pastoral lease or licence may use the land only for farming grazing animals and ancillary purposes. The Commissioner has only limited powers to authorize any other use. However, viticulture, as an example, could be approved in this way. Use of pastoral land for a non-pastoral purpose without such an approval would constitute a breach of the requirements of the Act and of the lease or licence. The Commissioner may authorize a wide range of commercial recreation or tourist activities under a recreation permit. The one-section provision for recreation permits is an unsatisfactory vehicle for approving major new uses of Crown land, and needs to be revised.

5. Enforcement of Obligations under Pastoral Leases

Where a lessee is in breach of a covenant in a pastoral lease, the Commissioner may pursue remedies on behalf of the Crown to stop the non-compliance and to compensate for loss. The remedies available are not as clear as one would hope because of overlap between the provisions of the Land Act, the Crown Pastoral Land Act, and the general law. What is clear however is that the person authorized to take action is the Commissioner. While there is authority for the courts to give redress where an enforcement officer refuses to act (*R v Metropolitan Commissioner of Police ex p Blackburn* [1968] 2 QB 118), the discretion to deal with non-compliance is the Commissioner's and the courts would be reluctant to interfere.

The Commissioner has different kinds of remedy available for breach of covenant, and the lessee has different avenues available for redress.

A. General Law

Under the ordinary law of landlord and tenant, a lessor can sue a lessee for breach of covenant, and obtain the remedies of general damages, for compensation, and injunction, to stop non-compliance. Suing a tenant for non-compliance does not forfeit the lease; the leasehold relationship continues unaffected. The right to sue is the ordinary consequence of the contractual nature of a lease and of the landlord-tenant relationship. The same goes for licences. However forfeiture of the lease is often a remedy for non-compliance. Section 107 of the Property Law Act 1952 implies a power in the lessor to re-enter and forfeit for breach of covenant.[2] Leases very generally include such a power expressly. Equity, however, uses the principle of relief against forfeiture to restrain the exercise of such a power to terminate a lease, the policy being that penalties with disproportionate effects should be guarded against.

[2] The Property Law Act 2007 makes new provisions for the cancellation of a lease, whether or not the lease was entered into before 1 January 2008. The new provisions replace those of the 1952 Act, of equity, and of common law. The 2007 Act abolishes the power to distrain, ie levy distress, on the tenant's goods for non-payment of rent.

There are numbers of indications in the Acts that pastoral leases are in their character like other leases, subject of course to the particular rules in the legislation. One notes in section 24(1)(e) and (f) of the 1948 Act that the powers of the Commissioner include the power to sue to recover money due to the Crown, and to enforce contracts. A lease is a form of contract.

A court is likely to start with the proposition that these aspects of the general law apply unless the statute provides to the contrary. The courts will not lightly interfere with rights of access to the general courts to enforce legal rights.

B. Forfeiture under Land Act Section 146

Section 146 of the Land Act provides a general mechanism for forfeiture. Where the Commissioner (formerly the Board) has reason to believe that any lessee or licensee is not fulfilling the conditions of his or her lease or licence in a bona fide manner according to their true intent and purport, the Commissioner may hold an inquiry into the case, giving the lessee or licensee an opportunity of explaining the matter. If the Commissioner is satisfied that any one of the grounds have been established, he or she may then, with the approval of the Minister, declare the lease or licence to be forfeited. There is a right of appeal against the Board's decision to the High Court: section 18. The four grounds specified in section 146(2) concern non-payment of rent and other money, non-occupation by the lessee or licensee, non-compliance with conditions, and abandonment.

Feary v Commissioner of Crown Lands [2001] 1 NZLR 704 concerned an application by pastoral lessees for relief against forfeiture after the Commissioner had decided to forfeit the lease; can a lessee of pastoral land seek relief against Commissioner? Panckhurst J held that section 146 of the Land Act 1948 contains an element of discretion, which must enable the decision-maker to bring into account considerations similar to those that influence the Court when relief against forfeiture is sought. However, the decision-maker need not approach the task upon the basis of a presumption, or leaning, in favour of the lessee (para 28). The Court therefore did not find it necessary to answer the question whether relief against forfeiture was available. The Court went on to consider its role in an appeal under section 18 of the 1948 Act, holding (para 32) that normal principles apply when an exercise of discretion is challenged on appeal, so the Court does not enjoy the wide discretion which relief against forfeiture entails.

In effect *Feary v Commissioner of Crown Lands* dealt with the matter as the exercise of a public law discretion, requiring fair process and proper considerations, rather than one of judicial intervention in a private transaction. Certainly this conclusion is backed up by J A B O'Keefe, 'The Crown as Landlord' in G W Hinde, ed, *Studies in the Law of Landlord and Tenant* (Wellington: Butterworths, 1975) p 303 at 328. But with respect the judgment and O'Keefe seem to fail to come to grips with the fact that the equitable doctrine of relief against forfeiture is more than a presumption; it is a principle that the courts should not enforce penalties like forfeiture where the result would be unfair, harsh, or disproportionate. There is ample evidence in the Act, in provisions discussed in Part 3 of this report, above, that a pastoral lease creates a private law relationship. Curiously, the Court was quick to use private law reasoning to dismiss the application for relief in the case of a pastoral occupation licence: para 13. The Court noted (para 20) that there was no

equivalent in the Land Act 1948 of section 19(4) of the Crown Pastoral Land Act 1998, which stated expressly that 'Section 118 of the Property Law Act 1952 is not available in respect of a forfeiture under subsection (2)(c) of this section.'[3] Panckhurst J drew from this that relief against forfeiture is expressly excluded in the new regime. This is not free from doubt: see G Heath, 'Pastoral Leases – Appeal under Statute against Forfeiture' (2001) 9 Butterworths Conveyancing Bulletin 114. The principle of relief against forfeiture does not derive from the statute.[4]

C. Rehearing and Appeal under Land Act 1948 sections 17 & 18

Section 17 of the 1948 Act allows any person aggrieved by a decision of the Commissioner (formerly the Board) on any determination 'of an administrative nature' to apply for a rehearing, and the Commissioner may grant a rehearing if he or she thinks that justice requires it, and modify the decision. There are some limitations on what can be reheard. This right is more akin to a review, given that there would not generally be a hearing in any real sense in the first place.

Section 18 of the 1948 Act allows any person aggrieved by a decision of the Commissioner (formerly the Board) on any determination, but not a determination 'of an administrative nature' to appeal the decision to the High Court. The appeal appears to be a general right of appeal, in the form of a case stated if the parties can agree, or on evidence if not. The dividing line between administrative and non-administrative determinations is by no means clear; the idea of a simple distinction between administrative and judicial functions is less common in statutory and administrative law than it was fifty or a hundred years ago.

The Court *Feary v Commissioner of Crown Lands* [2001] 1 NZLR 704 considered the appeal available under section 18 of the 1948 Act against a decision of the Commissioner. Normal principles apply, that is (it appears) normal principles of procedure and administrative law, when an exercise of discretion is challenged on appeal, so the Court does not enjoy the wide discretion which relief against forfeiture entails. As noted above, this interpretation may be unduly restrictive.

D. Remedies under CPLA 1998 section 19

Section 19 of the Crown Pastoral Land Act appears to give the Commissioner a parallel remedy of application to the District Court, in relation to a 'reviewable instrument' ie a pastoral lease (Land Act section 66) special leases (Land Act section 67) or pastoral occupation licence (Land Act section 66AA or CPLA section 14(7)). Where the Commissioner alleges a breach of a reviewable instrument, he or she may apply to the District Court for an examination. The Court may order remedial action or exemplary damages. Only subsection 19(2)(c), for the case of forfeiture, envisages awards similar to

[3] Section 19(4) now refers to sections 244 to 257 of the Property Law Act 2007.

[4] The position of the equitable principle of relief against forfeiture is further complicated by the repeal of the Property Law Act 1952 by the Property Law Act 2007. The 2007 Act in s 8(4) says that where one of its provisions is inconsistent with one in another enactment, the provision in the other enactment prevails. In effect that does the same thing as s 19(4) of the Crown Pastoral Land Act, ensuring that s 19 and not the PLA governs CPLA forfeitures. But it still may not oust the equitable principle of relief against forfeiture.

ordinary damages, up to $50,000 in the form of the likely costs to the Crown of remedying the breach. (Why the Court cannot order ordinary damages to be paid – surely the most typical remedy in civil proceedings – is not clear; indeed the drafting is very odd.) Or the Court may declare the reviewable instrument (lease or licence) is forfeit, that is, terminated. The breaches covered by this are itemized as any contravention of a provision of, or covenant contained in, the instrument; or any contravention of the statutory controls on removing timber (Land Act section 100), burning vegetation (CPLA section 15) or disturbing soil (CPLA section 16).

E. Criminal Penalties

The Land Act 1948 provides that certain acts are offences, subject to the general penalty provision, section 182.

F. Discussion

While it is clear that the Commissioner is the person who must act in enforcement, and that he or she must comply with the legislation, it is less clear whether he or she can choose between different statutory procedures, and whether he or she can sue in the courts under general civil procedure. Nor is it clear to what extent the courts, whether on appeal in the statutory procedures or in civil proceedings, can follow the general rules and principles of law.

It may be noted that decisions in the tenure review process can not be reviewed or appealed under the procedures open to aggrieved lessees: section 100 of the 1998 Act.

6. Tenure Review Generally

Part 2 (sections 24-82) of the Crown Pastoral Land Act 1998 establishes the system for tenure review of pastoral leases. Part 3 (sections 83-94) extends the tenure review system to land held under an unrenewable occupation licence and to unused Crown land. Part 4 (sections 95-100) contains incidental provisions for both kinds of review. It is not proposed here to give an account of the history and politics of tenure review.

A. What Lands

The main lands concerned are pastoral leases. A review may be carried out of the land under a reviewable lease: section 27. ‘Reviewable lease’ is defined as a lease under section 66(1) of the 1948 Act (a pastoral lease) or section 67 (various special leases of non-pastoral land). But the definition excludes a lease over land all of which is vested in a State enterprise under the State-Owned Enterprises Act 1986, and excludes land under a section 67 lease over land all of which is conservation area under the Conservation Act 1987 or reserve under the Reserves Act 1977.

There may also be included in the review of a lease neighbouring land that is in an occupation licence (section 28 of the 1998 Act), that is unused Crown land (section 29), that is freehold land (section 30), or that is in a conservation area or reserve (section 31).

Necessary consents must be obtained to include such lands. The power to include such lands could have considerable effect.

B. Consent

Tenure review is by consent. The Commissioner 'may' undertake a review (section 27), may decide how many to undertake (section 32), and may decide to discontinue a review (section 33). The assent of the holder (lessee or licensee) is needed for a review to begin (section 27), and the holder or one of holders may discontinue the review (section 33).

C. Procedure

The Commissioner may undertake a review: section 27. The Act does not spell out the form or content of the review.

The Commissioner may then put a preliminary proposal to the leaseholder: section 34. What the preliminary proposal must deal with and contain is identified in sections 34 to 42. In particular the preliminary proposal must 'designate' parts of the land for Crown ownership, Crown control, and disposal to any person. (Disposal to 'any person' will normally be conveyance in freehold to the leaseholder.) Sums of money to be paid for land will be stated. 'Protective mechanisms' such as easements and covenants may be included to safeguard public interests in land to be freeholded. The preliminary proposal is publicly notified (without the financial information), so that submissions may be made: section 43.

The Commissioner may then put a substantive proposal to the leaseholder: section 46. It may be the same as, or a modified version of the preliminary proposal. A substantive proposal needs the consent of the Minister of Conservation for a number of cases where the proposal affects a conservation area, reserve, or marginal strip, and where certain kinds of easement or covenant are proposed: sections 48 to 59. (The Minister of Conservation will have given provisional consent under section 41.) The leaseholder has three months to accept or reject the substantive proposal: section 60.

An acceptance is irrevocable and binding on the leaseholder and the Commissioner: section 60(5). After an acceptance the proposal is registered on every relevant instrument of title to the land: section 61. After survey, a final plan is prepared, approved, and registered: sections 62 to 64. Upon registration of the approved plan arising out of the substantive proposal, the notice of the substantive proposal has effect as a binding contract between the Crown and the holder: section 46(4). Upon registration of the plan, land vests, or is to be disposed of, as designated, subject to any stipulated concessions, easements, covenants, and the like: sections 65 to 81.

Subordinate Rules about Procedures. There is no power to make delegated legislation for these procedures such as regulations with binding effect. As is common in government departments, LINZ has adopted a series of standards to regularize the flow of its work and to clarify expectations. Such standards are perfectly in order but do not have the legal effect of statutory instruments.

Consultation and Submissions. In these procedures are requirements to consult. The Commissioner must consult the Director-General of Conservation before undertaking a review, putting a preliminary proposal, or putting a substantive proposal: section 26. The Commissioner may consult any person at any time about those matters – section 26(2) – although in the ordinary course of events an official such as the Commissioner is able to consult people anyway. The Commissioner must consult with the relevant iwi authority on a preliminary proposal, and in preparing a substantive proposal must consider all matters raised by the iwi authority: sections 44 and 47. There is no statutory duty to consult with leaseholders, with public interest groups, or local authorities.

The proper effect of the obligation to consult is a matter returned to below.

In addition to consultation, the Commissioner is obliged to give public notice of a preliminary proposal, inviting persons and organisations to make written submissions on the proposal: section 43. Before putting a substantive proposal to a leaseholder the Commissioner must consider all such written submissions: section 47. It may be observed that this 'notice and comment' procedure provides only a modest degree of public participation in tenure review. The rationale probably lies in a policy of protection of privacy in what can be regarded as a bilateral process between the Crown and the leaseholder.

D. Key Decisions: Beginning Review, Preliminary Proposal, Substantive Proposal

While there are a number of decision points in the process of tenure review, the most important of the decisions made by the Commissioner must be the decision to put a substantive proposal to the leaseholder. In effect the proposal is an offer which if accepted is binding on the Crown and the leaseholder. However, the decision to initiate a review, and the decision to put a preliminary proposal are also important. It is proposed to focus on the decision of the Commissioner to make a substantive proposal under section 46. In fact the analysis of this decision applies in large part to the other decisions to be made.

E. Outcomes Available

The possible outcomes of a tenure review are described in terms of what can be done with different land in a preliminary proposal – sections 35-42. The main classes of land are dealt with in section 35 – land under a pastoral lease or other reviewable instrument, land held in fee simple, and unused Crown land. Under subsections 35(2) and (3) such land can be designated in a preliminary proposal as follows:

> (2) A preliminary proposal may designate all or any part of any land to which this section applies as–
> (a) Land to be restored to or retained in full Crown ownership and control –
> (i) As conservation area; or
> (ii) As a reserve, to be held for a purpose specified in the proposal; or
> (iii) For some specified Crown purpose; or
> (b) Land to be restored to or retained in Crown control –
> (i) As conservation area; or
> (ii) As a reserve, to be held for a purpose specified in the proposal; or
> (iii) For some specified Crown purpose; or
> (iv) Under the Land Act 1948; or

(c) Land that may be disposed of to any person.
(3) A preliminary proposal may designate all or any part of any Crown land to which this section applies as land to be disposed of by freehold disposal to a person specified in the proposal.

Such designations may be qualified, conditional, or subject to preliminary consents: sections 36 and 41. Concessions and protective mechanisms (easements and covenants) are dealt with: sections 36-40. If the land under review is already conservation area or reserve, the range of possible designations is more restricted: sections 37 and 38. However the main possibilities are those identified in section 35: Crown ownership of different kinds, and disposal to identified persons.

It is a necessary implication that land held by the Crown as a result of a completed tenure review is no longer pastoral land. However the status of land under section 35(2)(b)(iv), land restored or retained under Crown control under the Land Act 1948, is not clear.

7. Matters to be Taken into Account in Tenure Review

At the heart of tenure review is the decision of the Commissioner about what proposal to put to the leaseholder, both at the preliminary stage and at the final substantive stage. It is plain that the Commissioner enjoys considerable discretion in making this decision. The Commissioner's decision is not subject to hearings or appeal. Indeed it is only partly public. While it appears that the discretion is a considerable one, it is not unrestricted, no more than is any statutory power of decision. Some restrictions appear on the face of the statute, while others require closer analysis. The starting point must be the terms of the statute about what matters must be taken into account, followed by a consideration of the likely approach of the courts.

A. Statute

Often a statute, especially a modern one, says the relevant considerations that are to be taken into account in exercising a statutory power of decision. Section 46(1) of the CPLA simply says:

> If a preliminary proposal has been put to the holder of 1 or more reviewable instruments and notified under section 43, the Commissioner may in writing put to the holder a substantive proposal that is the same as or a modified version of the preliminary proposal.

However three elements of the Act may be referred to in order to provide clarification of the relevant considerations stated by the legislature for the exercise of this power: section 25 to begin with, as it identifies matters to be taken into account, then section 24, which states the objects of tenure review, then section 2, in respect of definitions.

Section 25:

> Matters to be taken into account by Commissioner– (1) In acting under this Part, the Commissioner must (to the extent that those matters are applicable) take into account—
>
> (a) The objects of this Part; and
> (b) The principles of the Treaty of Waitangi; and

(c) If acting in relation to land used or intended to be used by the Crown for any particular purpose, that purpose.

(2) In acting under this Part in relation to any part of the land held under a reviewable instrument or reviewable instruments, the Commissioner must take the objects of this Part into account in the light of—

(a) Their application to all the land held under the instrument or instruments; rather than

(b) Their application to that part of the land alone.

Section 24:

Objects of Part 2– 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.

Section 2 provides definitions relevant to section 24(b):

'Significant inherent value', in relation to any land, means inherent value of such importance, nature, quality, or rarity that the land deserves the protection of management under the Reserves Act 1977 or the Conservation Act 1987

'Inherent value', in relation to any land, means a value arising from–

(a) A cultural, ecological, historical, recreational, or scientific attribute or characteristic of a natural resource in, on, forming part of, or existing by virtue of the conformation of, the land; or

(b) A cultural, historical, recreational, or scientific attribute or characteristic of a historic place on or forming part of the land

B. Law on Statements of Matters to be Taken into Account

An obligation to take identified matters into account is common in legislation conferring a power of decision on some one. But 'to take into account' can have two meanings. In *Metropolitan Water Board v St Marylebone Assessment Committee* [1923] 1 KB 86 at 99, Lord Hewart CJ described them as: ' "To take into account" in the sense of including figures in a mathematical calculation is one thing; "to take into account" in the sense of paying attention to a matter in the course of an intellectual process is quite another thing.' (Also Sankey J at 103.) This was quoted with approval by Devlin J in *Flowers v George Wimpey & Co* [1955] 3 All ER 165 at 172, holding that he had a case of giving effect to figures and estimates – the former meaning – so that he had no room for exercise of any discretion. However in *Stott v Sir William Arrol & Co* [1953] 2 QB 92 the Court, in calculating damages for personal injury, held that it still had some discretion.

In *R v CD* [1976] 1 NZLR 436 Somers J suggested that a direction that a decision maker exercising a discretion 'shall take into account' specified matters required that they must necessarily affect the discretion. This could be distinguished from 'shall have regard' – although in the statute before Somers J the words 'without limiting or affecting the Court's discretion' made the distinction sharper than it would have been otherwise.

Haddon v Auckland Regional Council [1994] NZRMA 49 (PT) considered 'shall take into account' in section 8 of the Resource Management Act 1991 – the Treaty section. The Planning Tribunal referred to *R v CD* (erroneously describing it as a Court of Appeal decision) and found no other cases on point. It went on to say, at page 61:

> It would appear that the duty 'to take into account' indicates that a decision-maker must weigh the matter with other matters being considered and, in making a decision, effect a balance between the matter at issue and be able to show he or she has done so.

This was followed in *Sea-Tow Ltd v Auckland Regional Council* [1994] NZRMA 204 (PT).

Bleakley v Environmental Risk Management Authority [2001] 3 NZLR 213 emphasized the importance of the statutory context in dealing with the range of possibilities that the phrase suggests. It interpreted the phrase in section 6 of the Hazardous Substances and New Organisms Act 1996. McGechan J said at para 72:

> The first question is what is required in law by the s 6(d) requirement to 'take into account'? I do not propose to dwell on other judicial interpretations related to other statutes. Some do not easily reconcile. On occasions the phrase has been held to require some actual provision to be made for the factor concerned, but all depends upon context. In this case context is clear and decisive. There is a deliberate legislative contrast between s 5 'recognise and provide for' and s 6 'take into account'. When Parliament intended that actual *provision* be made for a factor, Parliament said so. One does not 'provide for' a factor by considering it and then discarding it. In that light, the obligation to 'take into account' in s 6 was not intended to be higher than an obligation to consider the factor concerned in the course of making a decision – to weigh it up along with other factors – with the ability to give it, considerable moderate, little, or no weight at all as in the end in all the circumstances seemed appropriate.

And indeed Resource Management Act cases have found the same in contrasting section 6 ('shall recognise and provide for') with sections 7 ('shall have particular regard to') and 8 ('shall take into account'). Care is needed in extrapolating from RMA cases, because no matter which of the phrases in sections 6, 7, and 8 is in issue, the purpose in section 5 prevails over them all.

Both the RMA 1991 and the HSNO Act 1996, enacted around the time of the Crown Pastoral Land Act 1998, can be referred to in order to show that when Parliament wanted to require a matter to be given effect to, it would say 'recognise and provide for' rather than 'take into account.' In this respect it therefore seems necessary not to give undue emphasis to *R v CD*.

It is desirable to bear in mind that even where a statute does not list the matters to be taken into account, there is a range of permissible matters beyond which a decision-maker must

not venture. The range of permissible matters depends on the objects of the statute in question. This general principle is touched on in *Attorney General v Feary*, High Court, Christchurch, CP89/97, Chisholm J, 12 Nov 1997, noted above. In providing the parties with some pointers for the resolution of their differences, at p 11 the Judge urged the Crown to bear in mind

> that it could be argued that when exercising a discretion under the Land Act the [Crown] is required to take into account the policy and objects of that Act and not conservation issues. In this regard reference has been made to a Crown Law Office opinion of 4 September 1992 and to *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 and *Spectrum Resources Ltd v Minister of Conservation* [1989] 3 NZLR 351.

The principle is a very basic one in administrative law in relation to the exercise of statutory discretions.

C. Principles of the Treaty

The principles of the Treaty of Waitangi have been subject to extensive interpretation and debate. Again, the RMA (section 8) is prominent in the cases. One of the more recent full discussions is *Carter Holt Harvey Ltd v Te Runanga o Tuwharetoa Ki Kawerau* [2003] 2 NZLR 349 (HC).

D. Discussion

From the above, several points can be made.

(i) The requirement to take the three listed matters into account is mandatory. They must have a role in the decision-maker's consideration.

(ii) But the requirement is one to pay attention to these matters as part of the intellectual process of evaluating and deciding. It is a matter of exercising discretionary judgment. It is not a matter of calculation or numerical estimation.

(iii) It is not mandatory to give effect to all the listed matters all of the time. The words in brackets in section 25 indicate that. But even without those words, that is likely to be how a court would understand the provision. The matters are to be weighed up with other matters. Parliament simply requires them not to be left out of the weighing up.

(iv) There is no indication that Parliament intended the list to be exclusive and exhaustive. The Commissioner has a broad discretion. The Commissioner may take other matters into account, provided that they are consistent with the stated objects of the Act or the part of the Act, and the intention of the legislature generally.

8. Objects of Tenure Review

A. Internal Structure

There is an important internal structure in the list of objects of tenure review in section 24. (The section was quoted in full above.)

Primacy of ecologically sustainable management. Promotion of the management of reviewable land in a way that is ecologically sustainable is more important than freeing land from management constraints. Parliament has made the latter 'subject to' the former. This drafting term is familiar and quite clear in ensuring that where objects conflict, one of them is to prevail.

Promotion of the management of reviewable land in a way that is ecologically sustainable is more important than either securing public access and enjoyment or the freehold disposal of reviewable land. Again, the drafting term 'subject to' is used.

Only the protection of significant inherent values of reviewable land has the same status or primacy as promotion of the management of reviewable land in a way that is ecologically sustainable.

Significant inherent values. The protection of the significant inherent values of reviewable land is more important than either securing public access or the freehold disposal of reviewable land. It has the same status or primacy as an object of tenure review as promotion of ecologically sustainable management of land. Its relationship with freeing land from management constraints is less clear.

The protection of significant inherent values should be by restoration to full Crown ownership and control, in preference to protective mechanisms (ie easements and covenants).

Public access and enjoyment and freehold disposal. Public access to, and enjoyment of, reviewable land, and the freehold disposal of reviewable land, are subject to the promotion of ecologically sustainable management, freeing land capable of economic use from management constraints, and protection of significant inherent values. They can only be pursued to the extent that they do not conflict with the other objects. Nonetheless, they are objects of tenure review that the legislature has identified and has required to be taken into account.

There is very little room for dispute about these structural aspects of statutory interpretation of section 24. And there is little room for dispute about the implications of the structure for decisions of the Commissioner and for the preparatory work and information base required to make tenure decisions as Parliament has intended.

B. Ecologically Sustainable Management

As noted above, section 24(a)(i), which states the object of tenure review to promote the management of reviewable land in a way that is ecologically sustainable, has a primacy of

place in the objects of tenure review that is equalled only by the protection of significant inherent values. The object therefore calls for close examination.

Promotion implies positive action to bring something about. While it need not be all done at once, the thing must receive an active and not a passive approach. It indicates what choices should be made. (Cases on section 5 of the Resource Management Act 1991 relate.)

Management is a neutral term. It includes developmental and protective management. (Again, there is RMA case law.) The phrase is 'promote the management of reviewable land in a way that is ecologically sustainable' rather than 'promote the ecologically sustainable management of land' but it is unlikely that Parliament intended to focus the attention of decision makers on the promotion of management for its own sake. At the same time, management, in including possibilities such as development and utilization, is not purely protection or preservation. Protection and preservation may be entailed, even required, so that the management is ecologically sustainable, but the choice of the term management means that use and development are also entailed.

'Ecologically' is not to be found elsewhere in New Zealand statutes, although 'ecological' appears in a number of instances, such as in the 'ecological areas' set aside under the Conservation Act 1987. The definition of ecology / ical in the *Concise Oxford Dictionary* is confined to its scientific aspect.

> ecology ● **n.** the branch of biology concerned with the relations of organisms to one another and to their physical surroundings.
> - DERIVATIVES ecological …

The definitions of ecology and ecological in the *Shorter Oxford Dictionary* (1993) are:

> ecological
> Of, belonging to, or concerned with ecology
> ecology
> **1.** The branch of biology that deals with organisms' relations to one another and to the physical environment in which they live; (the study of) such relations as the pertain to a particular habitat or a particular species … **2.** (Also **E**-) The political movement that seeks to protect the environment, esp. from pollution. Usu. *attrib*. L20.

Sustainability is not defined in the Crown Pastoral Land Act, nor is ecologically sustainable management. But the idea is plainly one of environmental protection; the adverb 'ecologically' emphasizes that. And there are none of the elements of the definition of 'sustainable management of natural and physical resources' in section 5(2) of the RMA that give it a meaning that balances socio-economic needs with protection. Sustainable implies a manner that is capable of being maintained or supported. What is to be sustained is the relations of organisms to one another and their physical surroundings, and the environment generally.

The Act indicates that a distinction can be drawn between land use (ie land management) that produces ecological sustainability, and land use that does not. It requires that the former be promoted over the latter. The tenure review process is to be conducted in order to do so. As will be discussed below, the Commissioner should have an adequate information base in order to determine what land uses promote ecological sustainability.

C. Removal of Management Constraints

Section 24(a)(ii) states that one of the objects of tenure review is to enable reviewable land capable of economic use to be freed from the management constraints (direct and indirect) resulting from its tenure under reviewable instrument. As noted above, this object is subject to the promotion of ecologically sustainable management.

This object in effect states a presumption that the tenure of land under a reviewable instrument (a pastoral lease etc) imposes management constraints, direct and indirect. That is a judgment that the legislature has made. One could call it a value, but it seems more like a policy judgment or decision, on a matter where arguments and evidence could be (and perhaps have been) marshalled on both sides. Certainly the intention of phasing out the pastoral lease has always been a key aspect of tenure review.

The subparagraph then requires a distinction to be drawn between land that is capable of economic use and land use that is not. That distinction must be drawn in the course of tenure review in order adequately to fulfil this object, generally, and in relation to specific lands under review. Whether land is capable of economic use is a matter of fact and judgment. Deciding the matter requires an adequate information base, and suitable advice and expertise. Capability for economic use probably includes reasonably foreseeable uses.

The next step in the subparagraph's requirements is that the land identified as being capable of economic use is to be freed from the management constraints resulting from its tenure under a reviewable instrument. This does not quite say that pastoral leases (the main form of reviewable instrument) are to be eliminated, but the Act provides few options for the reshaping of pastoral leases, so terminating pastoral leases seems to be the main intention of this aspect of tenure review in relation to land capable of economic use. More significantly, the paragraph does not say that the freeing from constraints is to be brought about by freeholding. Freeholding is certainly the means that will occur to most readers. But in fact the object in this subparagraph does not rule out other options, such as Crown ownership and control, or Crown ownership and leases on terms different from pastoral leases. Indeed the object of freeholding is only stated in the object in paragraph (c), in parallel with securing public access and enjoyment, and subject to the other objects.

The objects for tenure reviews for Crown land not under pastoral leases or other renewable instruments (Part 3 of the 1998 Act) in section 83 do not include equivalent provisions about freeing land from management constraints. This element is necessary because of the characteristics of pastoral leases and like reviewable instruments. The same goes for protective mechanisms and freehold disposal.

As previously noted, this object is subject to the object of promotion of ecologically sustainable management of land. There may be cases where the consequence is that land must stay under the management constraints of a pastoral lease where the alternative would not be ecologically sustainable. On the other hand, the objects in section 24 are not phrased rules that must be followed rigidly in tenure review. Under section 25, the Commissioner must only 'take into account' the objects under Part 2, along with other matters.

D. Significant Inherent Values

As noted above, paragraph (b) of section 24 of the Crown Pastoral Land Act is equal in primacy to ecologically sustainable management, and the key phrase is expanded in section 2. 'Significant' narrows the term; not all inherent values will count. The values must demonstrate importance, nature, quality, or rarity. And they must do so to the degree that the land 'deserves' protection under the Reserves Act or Conservation Act. Neither of those Acts imposes a particular test for what land they are to protect. Neither states a threshold that must be crossed in order to acquire land for protection. Both, in fact, contemplate a number of different classes in which land may be managed and protected. 'Significant' certainly seems to exclude background levels of cultural, ecological, historical, recreational or scientific interest. It is reasonable to infer that only particular lands will be significant, although in any one tenure review there could be more or less of them.

However where the standard of significance is met, tenure review must be conducted so as to enable protection of the values. The objective of enabling such protection is more important than the objectives of public access and enjoyment or freehold disposal.

The protection is preferably provided by the restoration of the land concerned to full Crown ownership and control. There needs to be a sufficient reason if protective mechanisms are to be used instead.

E. Public Access and Enjoyment; Freehold Disposal

Paragraph (c) of section 24 enunciates the object of making easier two different, indeed competing, considerations. One can observe that for both of them the object of 'make easier' is mandatory in that it must be taken into account, and pursued to produce results that tend in a particular direction, but is softer than, say, 'provide.'

The first consideration is the 'securing' of public access and enjoyment. This seems to imply obtaining as a legal right, and not merely by a consent of the landowner that could be withdrawn. The second, the freehold disposal of reviewable land, is clear; the freeholding of pastoral leases and other renewable instruments is an object of tenure review.

As noted above, these two objects are subject to paragraphs (a) and (b), so that neither public access nor freeholding can be pursued at the expense of ecologically sustainable management or the protection of significant inherent values.

F. Unlisted Matters

Section 24 does not say whether it is a complete or incomplete list of objects in tenure review. While it would not be good statutory interpretation to suggest that any number of other objects can be implied, it is probably quite acceptable to assert that the objects stated are not the only ends that should be pursued in tenure review. The same can be said about

section 25, as we have noted; that the Commissioner can lawfully take into account matters not stated in the Act if it is clear that they are compatible with the Act as a whole.

Two possible such objects or matters may be considered. The first is the desirability that tenure review be conducted in a manner that amounts to sound management of Crown lands. It seems arguable that a court would agree that the nature of the Crown Pastoral Land Act, especially when read in conjunction with the Land Act, indicates that Parliament intended that the Commissioner exercise his or her powers under it in such a way that fair returns be obtained by the Crown, on behalf of the public, for the purchase of Crown assets.

Secondly, the objects of tenure review do not say anything directly about options of continuing management of land in Crown hands on behalf of the public except as part of the conservation estate. Such options appear to be contemplated by section 35, discussed above; land may be designated for some specified Crown purpose, and it may be designated to be restored to or retained in Crown control under the Land Act 1948. But even so, the Act does not take upon itself to lay out any new regime of management of Crown lands in replacement of pastoral leases; and it is beyond the scope of this report to speculate about such a regime as a policy option. At present such possibilities can find some general support in the objects discussed above, such as ecologically sustainable management, removal of management constraints, and protection of significant inherent values. Whether a court would accept the continuing management of land as Crown land apart from those express objects is less clear.

G. Discussion

The Act requires that the tenure review process be conducted in a manner that will ensure that the stated objects are properly taken into account. Three concluding observations can be made about giving effect to the objects. The first is that in respect of each object, the Commissioner of Crown Lands, as the decision-maker, must have an adequate information base, must have suitable advice and expertise available, especially on specialist matters, and must carry out an adequate assessment and evaluation of alternatives. The background is that the administration of statutory powers requires that decisions are taken on reasonable grounds. Obviously this is important as a matter of good public management, but it is also important as a matter of administrative law; inadequately-grounded decisions may be vulnerable to judicial review and invalidation. There is a substantial body of law on reasonableness and the need for a factual basis for a decision: HWR Wade and CF Forsyth, *Administrative Law*, 9th ed (Oxford: Oxford University Press, 2004) pp 272 and 351; PA Joseph, *Constitutional and Administrative Law in New Zealand*, 3rd ed (Wellington: Brookers, 2007) pp 923 and 931. *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) is particularly relevant in that it dealt with an argument that there had been a failure to take into account relevant considerations in exercising a statutory power. Richardson J at p 200 recognized that mistake of fact and unreasonableness, as to relevant considerations, overlap: "If the relevant considerations are to be taken into account it is obvious that the decision-maker must not be misinformed as to established and material facts, including in that expression incontrovertible expert opinion; and as Lord Diplock put it in the *Tameside* case he must take reasonable steps to acquaint himself with the relevant information." (The reference is to *Secretary of State for*

Education and Science v Tameside Borough Council [1977] AC 1014.) This seems to be relevant to the position of the Commissioner of Crown Lands. It may be added that care is needed in referring to cases where the statutory matrix is significantly different; the statute may simply require the decision-maker to determine the facts and apply the law to them, rather than taking into account the objects of the Act. Thus *Bryson v Three Foot Six Ltd* [2005] 3 NZLR 721 (NZSC), which has a lot to say about the need for a fact-finding body's decision to be supported by evidence, needs to be weighed carefully. So too does *Discount Brands Ltd v Westfield (NZ) Ltd* [2005] 2 NZLR 597 (NZSC), which insists that a decision-maker has an adequate information base, but in relation to a provision that required the decision-maker to be satisfied that particular facts were present. On the whole, however, cases like *CREEDNZ* make it clear that a decision-maker like the Commissioner must have an adequate understanding of the facts that the legislation makes material.

Thus, in tenure review, in relation to the promotion of ecologically sustainable management, one would expect that there would be an assessment of the ecological sustainability of different land uses (extensive pastoral, intensive pastoral including dairying, horticulture, viticulture, tourism, conservation, protection, etc). Equally there would be consideration and analysis of the likelihood of one or another of those land uses after freeholding and the effects of freeholding on ecologically sustainable management. The consideration would need to address the requirement of ecological sustainability, and not, for example, general land use potential. It would need to be specific to the particular lands under review.

The second general observation is that the objects of tenure review in section 24 contain elements of value and judgment alongside simpler statements of statutory policy and preference. While an object like ecologically sustainable management is reasonably clear, it is laden with judgment, and carries value as well. It is to prevail, but its content needs to be established. The same can be said for enabling the protection of significant inherent values, although the definition of that term channels the judgment that must be made. And it can be said for subordinate objects such as removal of management restraints and access and freeholding as well; none of those objects is to be pursued at all costs. A close reading of the Act, in the manner indicated above, demonstrates that section 24 is not about balancing competing values; it has an internal structure that avoids that. But subject to its guidance, it does require the Commissioner of Crown Lands to exercise considerable evaluation and judgment. It is therefore not accurate for the role of the Commissioner and his or her advisers in tenure review to be described as merely administrative, with no element of judgment or policy. Unlike for example a taxation statute, the objects of tenure review do not provide a mechanical system of rules that can be applied to dispose of individual cases once the facts are determined. The evaluation of the application of the objects in section 24 is a more demanding than such a view would suggest.

The third general observation to make here, repeating a point made in the Introduction, is that the nature of this paper is a general analysis of the law relating to pastoral leases and the tenure review process. The paper does not carry out any investigation of particular events or of the practices followed in relation to pastoral leases or tenure reviews, and it makes no assumptions about them.

9. Consultation in Tenure Review

It will be recalled that the Commissioner must consult the Director-General of Conservation before a review, before a preliminary proposal, and before a substantive proposal. He or she must also consult with the iwi authority on a preliminary proposal. And he or she may consult any other person at any time.

New Zealand statutes commonly require a decision-maker to consult identified parties before making a decision. Consultation provides a way for parties likely to be affected to be given a say without having to provide for hearings with their attendant formality. A body of case law about consultation grew up around the Treaty obligation to consult Maori under the Resource Management Act, even though the key sections there do not mention the procedure. Indeed it is sometimes difficult to prevent that special context from overshadowing other contexts. The leading cases are *Port Louis Corporation v Attorney General of Mauritius* [1965] AC 1111 (PC), *West Coast United Council v Prebble* (1988) 12 NZTPA 399 (HC), and *Wellington International Airport Ltd v Air New Zealand Ltd* [1993] 1 NZLR 671 (CA). Under the RMA, *Land Air Water Association v Waikato Regional Council*, Environment Court A110/01, 23 October 2001, Judge Whiting, para 442, brings together the main principles from Environment Court decisions. Also see P Beverly, 'The Mechanisms for the Protection of Maori Interests under Part II of the Resource Management Act 1991' (1998) 2 NZJEL 121 at 128.

In brief, according to McGechan J in *West Coast United Council* (1988) 12 NZTPA 399 (HC) at 405, 'Consulting involves the statement of a proposal not yet finally decided upon, listening to what others have to say, considering their responses and then deciding what will be done.' The consulter must bring a proposal of which they inform the consulted parties, give them time to consider it, and give them an opportunity to state their views. The nature of the consultation must be related to the circumstances, but it must be carried out fairly and never perfunctorily or as a mere formality.

Brower (pages 82-93) records how the law on consultation requirements has filtered through into tenure reviews. Without deciding exactly what is and is not a misapprehension, it is possible to make a few comments about what is to be read, or inferred, there.

(i) Consultation does not require neutrality. It requires openness to what the consulted party has to say, and it requires fairness in making sure that the consulted party can provide its input effectively. But it does not prevent the consulting party from having policies of its own. While it would be wrong to consult on a proposal that it had no intention of changing, it can certainly consult on the basis of a proposal that is consistent with its usual policies, and which it intends to put into effect if nothing in the consultation is enough to make it change its mind.

(ii) A party that must consult can also pursue its own interests. Consultation need not deter a party from making a decision consistent with its own interests. *Wellington International Airport Ltd v Air New Zealand Ltd* [1993] 1 NZLR 671 (CA) is a good example – a commercial enterprise with profit as its motive was obliged by

statute to consult the main users of its facilities as a restraint on its behaviour as the owner of an effective monopolist; but it was not obliged to obtain their consent to its prices. The veto power of the Commissioner – the power to withdraw from a tenure review at any time before the substantive proposal – is not compromised or watered down by reference to his or her duty to consult certain parties at certain points in the tenure review process.

(iii) A party who must consult can also negotiate. It is often said, rightly, that consultation is not negotiation. But the existence of a duty to consult does not prevent a party from negotiating as well if it thinks fit to do so and is not legally prevented from doing so. It can negotiate with the parties to be consulted, or with other parties.

(iv) A party who must consult can also advocate. It is commonplace in administrative law to find a decision-maker who is pursuing a definite policy, and is entirely at liberty to do so even while exercising statutory powers of decision. A usual case is a minister of the Crown who has been elected and appointed on a party policy platform. The cases generally hold that the decision-maker must exercise the power as Parliament had intended, and that usually requires him or her to be openminded, and willing to change or adapt the policy, or even abandon it. But the decision-maker is not wrong to have a policy and to advocate for it. Indeed, in government and administration we would often expect nothing less from conscientious officials.

(v) The decisions that result after consultation can certainly favour one interest over another. Indeed, a decision of any kind will inevitably do so. And the presence of a duty to consult in the procedures leading to the decision makes no difference to the range of decisions that can lawfully be made.

10. The Duties of the Commissioner in Tenure Review

As noted above, section 25 of the Crown Pastoral Land Act 1998 requires the Commissioner to take into account the objects of tenure review stated in section 24, the principles of the Treaty of Waitangi, and other specified matters. The Act makes a number of other requirements of the Commissioner. The Act requires the Commissioner to consult others at certain points. Naturally, the Commissioner is obliged to comply with all these requirements. However we have noted that some of them, such as in the objects, require considerable exercise of judgment; they are far from mechanical. Others of them, such as those for consultation, must be carried out properly and fairly, but do not displace other aspects of the Commissioner's role and decision-making functions.

The office of Commissioner of Crown Lands is presently established by section 24AA of the Land Act 1948. (This section replaced previous provisions in 2002.) The duties of the Commissioner are stated in sections 24 and 25 of the 1948 Act. As noted above they include general powers and duties to protect Crown lands, to prevent misuse, and to deal with trespassers by expelling them or suing them. The Commissioner is expressed as acting in the name of or on behalf of the Crown. These particular provisions are consistent

with the pattern of the 1948 and 1998 Acts generally. The Commissioner manages Crown land, classifies it, considers its suitability for disposal. Where it disposed of by sale, the Commissioner is the vendor. Where it is disposed of by lease, the Commissioner is the landlord. In general terms, therefore, the Commissioner has a duty to protect the interests of the Crown in Crown land. In this respect the Commissioner is in a similar position to many officials who are responsible for public assets, whether land, funds, or shares in state-owned enterprises.

The general duty of the Commissioner to protect the interests of the Crown in Crown land must be performed in the light of specific statutory requirements such as those imposed by the 1998 Act for the process of tenure review, but it is not abolished by those duties. There is nothing in the Act to suggest that the general duty of the Commissioner to protect the Crown's interest is abolished. Rather, the general duty is the background against which the specific requirements are to be understood. It is therefore permissible for the Commissioner to protect and advance the Crown's interest in the course of tenure review, provided that the specific requirements of the Act are observed.

It is reasonably common in the legal arrangements for public bodies and public procedures for a body to be responsible for some aspect of the public interest, and to have legal powers that it can exercise to pursue that interest. Those powers may affect the interests of particular persons. Where they do, the public body will be under a duty to act fairly in the exercise of its powers. This is one of the basic requirements of administrative law. But a duty to act fairly does not mean that a public body may not pursue the public interest, pursue a particular policy, or hold an opinion on the proper course of action. Indeed, public bodies are typically required to do all those things, and act fairly at the same time.

This applies to the Commissioner of Crown Lands. The Commissioner must act fairly in exercising his or her statutory powers in tenure review, but he or she may – must – defend the Crown's interest in Crown lands and work to implement the objects of tenure review while doing so. He or she may form views and policies, and speak up, and advocate, for them. This goes for consultation as well, as has been demonstrated above.

Fairness must not be confused with neutrality. Acting fairly does not require the Commissioner to act like an umpire or referee or judge. In effect, such a view is a version of what in administrative law is known as the judicial fallacy. That fallacy was that a duty to act fairly could only be imported where the decision was of a judicial and not administrative character. It affected New Zealand and English law for some decades up until it was repudiated in 1963 by *Ridge v Baldwin* [1964] AC 40. See H W R Wade & C F Forsyth, *Administrative Law, 8th ed* (Oxford: Oxford University Press, 2000) p 481. The distinction between judicial and administrative decisions is no longer used to restrict the principle of fairness or natural justice. The converse is that there are innumerable instances where a decision-maker is required to act fairly but may still be actively pursuing a preferred policy: see for example Wade and Forsyth p 526. The decision-maker must remain open-minded about the policy, its implementation, and its effect on particular persons; but he or she is not banned from having a policy.

Neutrality may be a fitting description of the role that the Commissioner of Crown Lands plays in tenure review as between leaseholders, government departments including the Department of Conservation, local bodies, and other interests. The Commissioner would be wrong to declare an alliance with any such parties. But neutrality does not describe the role of the Commissioner in relation to the statutory objects of tenure review, or to the general duties of the office of Commissioner.

One point that may deserve further investigation is whether any general legislation affecting the public service is relevant to the Commissioner's duties. The State Sector Act may be relevant but it is mostly concerned with employment relations.

Finally, it may be desirable to consider the extent to which the Commissioner's performance in tenure review is subject to external monitoring and review. The Commissioner reports to the Minister of Lands on the exercise and performance of his or her statutory powers and functions, according to section 24AA of the Land Act 1948. But the Crown Pastoral Act 1998 enacts no more specific mechanism. This is striking. It may be desirable to consider the role that central government entities play at present, or should play, in order to ensure that the objects of the legislation are being accomplished. The management of assets and environmental performance could involve Treasury, the Auditor-General, the Parliamentary Commissioner for the Environment, and the Ministry for the Environment. Comparisons could usefully be made with existing arrangements such as those for state-owned enterprises in the form of the Crown Company Monitoring Advisory Unit, and for the Electricity Commission in relation to environmental objectives.

11. Case Law and Literature

Secondary Literature

The works below are the items that have been located from recent years on the law concerning the Land Act 1948 and the Crown Pastoral Land Act 1998. There are other items available of a non-legal nature. There may be some gaps in the literature search in relation to the Land Act.

Brookers Land Law, 'Crown Pastoral Leases' 11.22-11.25, (Wellington, Brookers, 2001, electronic publication).

A L Brower (2006), 'Interest Groups, Vested Interests, and the Myth of Apolitical Administration: The Politics of Land Tenure Reform on the South Island of New Zealand',Wellington, NZ, Fulbright-New Zealand: 100.

G Heath, 'Pastoral Leases – Appeal under Statute Against Forfeiture' (2001) 9 Butterworths Conveyancing Bulletin 114.

Laws of New Zealand, 'Crown Land', K Robinson (Wellington: Butterworths, 1992, 1994).

J A B O'Keefe, *The Law and Practice relating to Crown Land in New Zealand* (Wellington: Butterworths, 1967).

J A B O'Keefe, 'The Crown as Landlord' p 303 in G W Hinde, ed, *Studies in the Law of Landlord and Tenant* (Wellington: Butterworths, 1975).

Cases

The cases below are recent (last ten years) decisions on the Land Act. No cases have been found on the Crown Pastoral Land Act. There are large numbers of Land Act cases from earlier years, collected for example in the *Abridgement of New Zealand Case Law*, H J Wily ed (Wellington: Butterworths, 1963). Full research of Land Act points would require investigation of such cases, and perhaps of Australian cases. There are also apparently cases in the *NZ Valuer* periodical, but they have not been located for this paper.

Attorney General v Feary, High Court, Christchurch, CP89/97, Chisholm J, 12 November 1997.

Commissioner of Crown Lands v Emmerson, District Court, Dunedin, LVP417/95, 22 August 1996, Everitt DCJ.

Feary v Commissioner of Crown Lands [2001] 1 NZLR 704.

Hunter Valley Station Ltd v Attorney-General, Court of Appeal, CA 38/05, William Young P, Robertson & Allan JJ, 26 May 2006.